

IS OSHA FAILING TO ADEQUATELY ENFORCE CONSTRUCTION SAFETY RULES?

HEARING

BEFORE THE
COMMITTEE ON
EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
ONE HUNDRED TENTH CONGRESS
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Tuesday, June 24, 2008
U.S. House of Representatives
Committee on Education and Labor
Washington, DC

The committee met, pursuant to call, at 10:04 a.m., in Room 2175, Rayburn House Office Building, Hon. George Miller [chairman of the committee] presiding.

Present: Representatives Miller, Kildee, Woolsey, McCarthy, Tierney, Kucinich, Holt, Davis of California, Grijalva, Bishop of New York, Sanchez, Sarbanes, Loeb sack, Yarmuth, Hare, Clarke, Courtney, McKeon, Petri, Platts, Wilson, Kline, Kuhl, Davis of Tennessee, and Walberg.

Staff Present: Aaron Albright, Press Secretary; Tylease, Alli, Hearing Clerk; Jordan Barab, Senior Labor Policy Advisor; Jody Calemine, Labor Policy Deputy Director; Fran-Victoria Cox, Staff Attorney; Lynn Dondis, Policy Advisor, Subcommittee on Workforce Protections; David Hartzler, Systems Administrator; Brian Kennedy, General Counsel; Thomas Kiley, Communications Director; Danielle Lee, Press/Outreach Assistant; Sara Lonardo, Junior Legislative Associate, Labor; Alex Nock, Deputy Staff Director; Joe Novotny, Chief Clerk; Rachel Racusen, Deputy Communications Director; Meredith Regine, Junior Legislative Associate, Labor; Michele Varnhagen, Labor Policy Director; Mark Zuckerman, Staff Director; Robert Borden, Minority General Counsel; Cameron Coursen, Minority Assistant Communications Director; Ed Gilroy, Minority Director of Workforce Policy; Rob Gregg, Minority Senior Legislative Assistant; Alexa Marrero, Minority Communications Director; Jim Paretti, Minority Workforce Policy Counsel; Molly McLaughlin Salmi, Minority Deputy Director of Workforce Policy; Hannah Snoke, Minority Legislative Assistant; Linda Stevens, Minority Chief Clerk/Assistant to the General Counsel; Sally Stroup, Minority Staff Director; and Loren Sweatt, Minority Professional Staff Member.

Chairman MILLER. A quorum being present, the committee will come to order.

And the purpose of this morning's hearing is to conduct an oversight hearing on OSHA and enforcement of construction safety rules. And at this point, I will yield to myself for purposes of an opening statement.

Over the past few months, a number of catastrophic and well publicized construction accidents have highlighted concerns about whether government health and safety agencies are doing enough to ensure safe working conditions at construction sites. In New York, two massive construction crane collapses have killed nine people, including one bystander.

In Las Vegas, over the last 19 months, 12 construction workers have been killed in construction projects on the strip. According to the Las Vegas Sun, more workers have died in the city in the past 19 months than died during the entire 1990s construction boom. An investigative series in the Las Vegas Sun detailed circumstances behind the deaths on the strip, including inadequate response from the Nevada Occupational Safety and Health Administration.

As our witnesses will describe today construction is one of the most dangerous industries for workers. On average, four construction workers die on the job every day. Unfortunately, most of these workers die one at a time, and their deaths do not garner the same level of attention that the media gave to the New York crane collapses.

There is no question that construction is an inherently dangerous job, and there is no one who would argue with that. The question is whether more can be done to prevent accidents and to make the industry safer. We intend to begin to answer that question today and explore ways to make the industry safer.

We will examine whether or not the U.S. Occupational Safety and Health Administration is doing everything it can to improve safety at construction sites. This committee has repeatedly raised serious concerns about OSHA's inability or unwillingness to issue needed health and safety standards for a number of different industries, and we have the same concern now about the construction industry.

We will also examine today whether OSHA has sufficient resources to do its job. In the boroughs of Manhattan and Queens, for example, Federal OSHA has only 20 inspectors to cover thousands of construction sites, and some of the inspectors are new trainees. We have nothing but praise for the dedication and work of those few valiant inspectors who perform every day, but they are faced with an impossible task. The root cause of that problem lies here in Washington.

We will also examine the role that cities can play in making construction sites safer. Because of the lack of Federal OSHA resources in the city, New York City decided to step in to address the hazards the city's construction boom has presented. The city reasoned that its actions not only protect workers but also protect members of the public who may be walking, driving, or living underneath a tower crane. By our count, and one of our witnesses confirmed this today, the city has more than 20 times more inspectors on the ground than OSHA has.

While we commend New York City for its activity in this area it is unclear whether other smaller cities have the same ability to put resources into construction safety that New York has. We also intend to examine today whether the Federal laws as now written may actually discourage some States and cities from maintaining

their own programs to enforce workplace safety rules unless there are overriding public safety concerns.

The State of Florida has tried to issue stronger construction safety regulations on its own, but those efforts were overturned by the courts because Federal OSHA regulations preempt any State enforcement in States that do not have their own occupational safety agencies.

Let me be clear, the U.S. Occupational Safety and Health Administration is an agency responsible for workplace safety, but workers must best be served by vigorous OSHA enforcement, coupled with renewed efforts by States and cities to make construction sites safer.

Finally, we will examine the enforcement tools that OSHA has to ensure construction site safety. OSHA has the ability to assess penalties against construction companies who violate the law, but those penalties appear to be low and really low enough to be considered just the cost of doing business. And they usually assess long after the inspections occur.

Moreover, OSHA does not have the authority to shut down a job site unless the agency can convince a judge that the site presents an imminent danger. The city has the authority to wield a much bigger stick. The New York Building Department has the ability to shut down dangerous job sites at a moment's notice potentially costing the contractor hundreds of thousands of dollars a day. We will discuss today whether OSHA ought to have the enhanced authority to shut down hazardous job sites without first jumping through excessively time-consuming legal hoops when workers' lives are on the line. These are not simple issues, but they are issues of life and death, and they demand the committee's attention. Today we will hear from the head of OSHA, the president of the Building and Construction Trades Department of the AFL-CIO, the acting director of the New York Department of Buildings, and we will also hear from a former ironworker and a contractor from Las Vegas who will speak to the hazards workers faced during the building boom. He will also address the personal loss that workers and families face when a loved one is killed on the job.

I want to thank all of the witnesses for being here today, and we look forward to your testimony and appreciate you giving your time to the committee.

And with that, I would like to recognize the subcommittee Chair, Ms. Woolsey from California, for the purposes of an opening statement.

[The statement of Mr. Miller follows:]

**Prepared Statement of Hon. George Miller, Chairman, Committee on
Education and Labor**

Over the past few months a number of catastrophic and well publicized construction accidents has highlighted concerns about whether government health and safety agencies are doing enough to ensure safe working conditions at construction sites.

In New York, two massive construction crane collapses have killed nine people, including one bystander.

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An investigative series by the Las Vegas Sun detailed the circumstances behind the deaths on the Strip, including the inadequate response from the Nevada Occupational Safety and Health Administration.

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Unfortunately, most of these workers die one at a time and their deaths do not garner the same level attention from the media that the New York crane collapses did.

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We will also examine today whether OSHA has sufficient resources to do its job. In the boroughs of Manhattan and Queens, for example, federal OSHA has only 20 inspectors to cover thousands of construction sites—and some of those inspectors are new trainees. We have nothing but praise for the dedication and work that those few valiant inspectors perform every day, but they are faced with an impossible task, and the root cause of that problem lies here in Washington.

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These are not simple issues, but they are life and death issues, and they demand this Committee's attention.

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We will also hear from a former iron worker and contractor from Las Vegas who will speak to the hazards that workers face during a building boom. He will also

address the personal loss that workers and families face when one a loved one is killed on the job.

I thank all of our witnesses for being here today and I looked forward to their testimony.

Thank you.

Ms. WOOLSEY. Thank you, Chairman Miller.

Thank you for holding this hearing on the recent crane and construction accidents that have plagued many of this Nation's construction workers, especially in big cities like New York and Las Vegas.

As you noted, there is a building boom going on in those cities. And while these booms bring many needed jobs to working people, today we are going to examine the terrible price that workers pay when their employers cut corners in a mad dash to compete for and complete their projects. We are aware of the large bonuses that contractors receive if they complete their building projects by a certain date, particularly if they are finished ahead of schedule. But in reverse, we know there are equally large penalties that some contractors pay if projects are late. With the almighty dollar ruling, it is not a surprise that safety often comes last, and the real penalty falls on the worker, the worker who is injured, or the worker who loses his or her life.

This hearing will point out, it appears, once again, that OSHA is failing to fulfill its mandate to keep workers in this country safe and to keep them healthy. With the construction industry that we are going to talk about today, the problem is pretty obvious. First, OSHA has not updated its crane and derrick standards since 1971. OSHA and other experts have long realized that this standard is out of date. And in fact, in the year 2003, OSHA began working on a new rule. Labor and Management came together, and they produced a draft in the year 2004. But here we are, it is 2008, and OSHA hasn't issued its proposed rule.

So we understand that the Department has sent the proposed rules to the OMB, and we hope, Administrator Foulke, that you are going to bring us some good news about that today about publishing these badly needed regulations.

Also, the resources for construction jobs, the resources for OSHA in general, such as staff and inspectors, to enforce the health and safety rules at construction sites are woefully inadequate. In fact, Federal OSHA, all of OSHA, has only 821 inspectors for the 29 States that don't have their own State OSHA programs, and the 21 States with their own health and safety programs have another 1,273 inspectors. This means that there are a total of 2,094 inspectors for the 8 million work sites in this country. Imagine that.

Finally, one reason for this low number of inspectors, I believe, is that OSHA takes a good part of its budget from enforcement and transfers those funds into unproven voluntary programs and consultations for employers. If those were working, we wouldn't be having an increase in accidents, particularly in the construction industry.

But as Chairman Miller did note, New York City takes health and safety seriously with its own inspectors. What we have to look at today then is why New York City is having the number of acci-

dents that they have been having lately. But I do congratulate the city on its diligence.

I share the chairman's concern that there are preemption and other issues that we must examine very seriously and that OSHA must be held accountable. Our workers are counting on us. They need to be assured that they are going to work in a safe place, that they will be safe and healthy, and they will be able to return to their families every night and every evening after they finish their jobs.

So thank you again, Mr. Chairman, and I look forward to the hearing.

Chairman MILLER. Thank you.

And now I would like to recognize Congressman McKeon, the senior Republican on the committee, for the purpose of an opening statement.

Mr. McKEON. Good morning Chairman Miller, members of the committee and our panel of witnesses. We are here this morning for a broad overview of OSHA's efforts to ensure worker safety within the construction industry.

Given a number of recent high-profile crane accidents, I expect that we will also look specifically at the crane and derrick standard currently in place, as well as the pending update to that standard that began with an OSHA-negotiated rulemaking process in 2004. It is my understanding that OSHA sent a proposal to revise and update the crane rule to the Office of Management and Budget earlier this month for final review and that we can expect to see final regulations in place before the end of the year.

Media reports have shown the devastation that can occur when construction equipment fails. As we have seen, this problem has not been isolated in one area of the country but has had consequences nationwide. Construction cranes, for instance, are powerful tools in today's construction arena. They are being built higher, can carry larger loads and, if used properly, improve the efficiency of a construction project. Cranes can eliminate many man hours for lifting and moving supplies and materials on the job site. They can also be among the most dangerous equipment for construction workers to be around. Constant vigilance is vital when workers are moving in and around functioning cranes.

Investigations into a number of recent crane accidents are still under way, and I expect these investigations to provide valuable information about how to prevent such tragedies in the future. However, I am very troubled by allegations in the *New York Times* that the city's chief crane inspector has been accused of taking bribes to certify cranes as operational and workers as having successfully passed licensing exams.

I request unanimous consent to include this article, dated June 7, 2008, in the hearing record.

[The information follows:]

[From the *New York Times*, June 7, 2008]

Top City Crane Inspector Accused of Taking Bribes

By WILLIAM K. RASHBAUM

The city's chief crane inspector was arrested on Friday and charged with taking bribes to allow cranes to pass inspection, the authorities said. He was also accused

of taking money from a crane company that sought to ensure that its employees would pass the required licensing exam.

The man, James Delayo, 60, the acting chief inspector for the Cranes and Derricks Unit at the city's Department of Buildings, oversaw the issuing of city licenses for crane operators. The case against him, announced by the Manhattan district attorney's office and the city's Department of Investigation, was filed just a week after the city's second fatal crane collapse in less than three months.

Officials said the accusations against Mr. Delayo bore no direct relation to the accident last week at 91st Street and First Avenue, where two workers died, or the crane accident on East 51st Street that left seven dead in March.

But the case was another blemish on a Buildings Department that has been reeling from construction deaths and inspection lapses this year, and for which deadly crane accidents are part of a lingering series of problems.

The agency's commissioner resigned last month and Mayor Michael R. Bloomberg has been struggling to find a replacement to run a department that has long been plagued by corruption and where critics say an underpaid, shorthanded staff of inspectors has been hard-pressed to deal with the city's building boom.

"This is a case where greed trumps safety," said Daniel J. Castleman, the chief assistant in the district attorney's office, which is also investigating the crane collapse last week. "With all the construction going on in New York City and the fatal accidents of the last few months, this type of conduct cannot and will not be tolerated."

Rose Gill Hearn, the commissioner of the Department of Investigation, said in a statement that her office was working with District Attorney Robert M. Morgenthau as part of a continuing inquiry into corruption at the Buildings Department.

"D.O.I.'s investigation revealed the profoundly disturbing and sobering realization that a senior inspector responsible for ensuring that cranes operating in New York City are in proper condition and are operated by qualified individuals is charged with selling out his own integrity in a way that compromised public safety," Ms. Hearn said.

Mr. Delayo surrendered on Friday morning to investigators and was arraigned in Criminal Court in Manhattan on a complaint that said he had admitted on Thursday to receiving the bribes. He was released on his own recognizance. A Buildings Department spokeswoman said he would be suspended without pay.

The charges against Mr. Delayo include third-degree bribe-receiving and first-degree tampering with public records, both felonies for which he could face up to seven years in prison. Among the charges was the accusation that he had provided a copy of the crane operator's exam to a crane company, for which an official involved in the case said Mr. Delayo was paid about \$3,000. The official, who spoke on the condition of anonymity because the investigation was continuing, said Mr. Delayo also provided the answers.

As the chief inspector, Mr. Delayo had responsibility for overseeing the inspection of all cranes, including tower cranes, the type that collapsed in the two recent fatal accidents. The allegations against Mr. Delayo made it easy on Friday for him to be seen as a symbol for the failures that have plagued the Buildings Department for years. In fact, as he made his way to a cab after court, he was accosted by a street sweeper who dropped his broom and demanded to know if he felt responsible for the crane collapse. He did not answer.

Mr. Delayo, whose Legal Aid lawyer said little that could be heard during the arraignment, entered no plea during the proceeding before Judge Abraham Clott of Criminal Court. Mr. Delayo, appearing slightly hunched and wearing a white shirt with thin blue and brown stripes, held his pants up, apparently because he had no belt on. Later, as he left the building housing Mr. Morgenthau's office, he wore a red bandanna as a makeshift belt.

Mayor Bloomberg, in a statement, said that he has "zero tolerance" for corruption anywhere in his administration, and that such conduct is "is all the more deplorable" in a public safety agency like the Buildings Department.

"The Department of Buildings has made enormous strides in rooting out corruption over the past six years, but this case underscores that there remains more work to do," he said.

Mr. Bloomberg, along with the City Council, on Wednesday announced a legislative package aimed at broadening oversight at building sites. But on Friday, the Manhattan borough president, Scott Stringer, who had said that the measures proposed by the mayor and the Council did not go far enough, called Mr. Delayo's arrest "stunning and frightening."

"The man in charge of issuing city licenses to crane operators has been accused of years of taking bribes to license cranes he did not inspect, and to license operators who did not pass a required test," Mr. Stringer said in a statement. "Under

the circumstances, before we begin any new procedures to implement the administration's construction reforms, we must have a top-to-bottom review of the Buildings Department, its procedures and its personnel."

The accusations against Mr. Delayo focus on smaller mobile cranes, known as Class C cranes.

A 26-year veteran of the Buildings Department, Mr. Delayo took bribes of "a couple of hundred dollars" in exchange for issuing licenses to about half a dozen Class C crane operators, including once to a man who did not even take the test, according to the criminal complaint and the official involved in the case.

All of the operators worked for the company, Nu-Way Crane Service of Copiague, N.Y., that paid for the test and the answers, said the official. Investigators searched the offices of Nu-Way on Friday, seizing computers and records, the official said. A crane inspector's test was found there, but investigators were unsure if it was the one Mr. Delayo was accused of providing.

A city official said that the Department of Buildings was suspending approvals for the company's cranes to operate and was evaluating the licenses issued to its operators.

Nu-Way did not respond to telephone messages left at the company's offices. An official with the company served last year on the Buildings Department's Cranes and Derricks Advisory Council.

The complaint said that on Thursday, Mr. Delayo admitted to Sadie Lopez, an investigator with the Department of Investigation, to meeting with and taking money from the owner and or employees of the crane company "on numerous occasions" from 2002 to 2007.

The authorities also learned that Mr. Delayo signed off on the annual inspection of between 20 and 30 Class C cranes without conducting any examination in exchange for "several hundred dollars" apiece, the official said.

Mr. Delayo, who lives in the Bronx, was promoted to acting chief inspector after the fatal crane accident in March. He makes \$74,224 a year.

In addition to the bribe-receiving and tampering with public records counts, the complaint charged him with first-degree falsification of business records and first degree offering a false instrument for filing, both felonies, and receiving an unlawful gratuity, a misdemeanor.

The Buildings Department issues licenses to crane operators who work within the city, while state officials issue such licenses across the rest of New York. Earlier this year, state officials reported similar problems with the integrity of the process under which they were granting licenses and said one longtime employee had approved 210 people for licenses despite their having failed the official exam, although he took no money and was charged with no crime.

Daryl Khan, Colin Moynihan and Sharon Otterman contributed reporting.

Chairman MILLER. Without objection, so ordered.

Mr. McKEON. Construction is vital to economic growth, but it is also an inherently dangerous industry. And that is why it is so important that steps be taken to help mitigate the risks and protect the workers. Because of the unique characteristics of construction job sites and their associated dangers, OSHA has put in place specific and extensive regulations directed at the construction industry. I look forward to learning more about those standards today.

We have before us a distinguished panel of experts, including OSHA Administrator Foulke, who has taken over the development of the crane regulation I mentioned earlier in the midst of its development. I am hopeful he will provide us with an update on the crane rulemaking that has been developed, as well as the other specific safety standards applicable to the construction industry. This hearing is an important first step to examine safety protections for workers in the construction industry with a particular emphasis on the crane accidents that have drawn so much attention in recent months.

I anticipate that the conclusion of OSHA's investigations will also help shape public policy on this important issue.

I would also request unanimous consent to include testimony for the record from Mr. Graham Brent, executive director of the National Commission for the Certification of Crane Operators. When this hearing was originally scheduled we were notified that it would focus exclusively on crane safety. Although the scope of the hearing has been expanded, I believe the record will be enhanced with the inclusion of Mr. Brent's testimony.

[The information follows:]

Prepared Statement of Graham J. Brent, Executive Director, National Commission for the Certification of Crane Operators (NCCCO)

Good morning Mr. Chairman, and distinguished members of the House Committee on Education and Labor. My name is Graham Brent and I am the Executive Director of the National Commission for the Certification of Crane Operators (NCCCO).

The National Commission for the Certification of Crane Operators (NCCCO) was formed in January 1995 as a non profit organization to develop effective performance standards for safe crane operation to assist all segments of construction and general industry.

The establishment of NCCCO came in the aftermath of the San Francisco tower crane collapse in 1989 which claimed five (5) lives and foreshadowed the tragedies we have witnessed this year in New York, Miami and elsewhere. The foundation of the CCO national crane operator certification program by a dedicated team of industry experts over a ten (10) year period reflected a genuine and earnest desire by the industry most affected by such accidents to improve the safety of lifting operations.

NCCCO's mission was—and remains today—to provide a thorough, independent assessment of operator knowledge and skills and, thereby, to enhance lifting equipment safety, reduce workplace risk, improve performance records, stimulate training, and give due recognition to the professional skill of crane operation.

The industry representatives who participate in NCCCO activities represent such groups as: contractors, labor unions, rental firms, owners, steel erectors, manufacturers, construction firms, training consultants, and insurance companies. Since NCCCO began testing in April 1996, over 325,000 written and practical exams have been administered to more than 65,000 crane operators in all 50 states.

Mr. Chairman, as tragic as the recent incidents in New York and Miami are, they need to be put in context. A recent survey (1) has revealed that there are an estimated 3,000 tower cranes in the United States, of which 2,100 might be in use at any one time. These tower cranes perform in excess of 100,000 lifts per day safely and without adverse consequence.

Nevertheless, the recent incidents we have witnessed are clearly completely unacceptable. It's important to recognize that cranes, in and of themselves, are not dangerous. In the hands of unqualified personnel, however, they can become deadly instruments. This raises two questions: #1 What personnel need to be qualified? And #2: How can that qualification be determined?

To the first question, OSHA has an overarching, if non-specific, requirement for all personnel engaged in the lifting operation to be trained and qualified and/or competent to perform the task they are assigned. This means the crane operator, to be sure. But it also extends to the rigger (who rigs the load to be lifted), the signalperson (who gives the operator verbal or visual instructions), and the inspector (who verifies that the crane has been maintained and erected correctly and in accordance with the manufacturer's instructions).

In answer to the second question, "how can that qualification be determined?", we believe that professionally developed and accredited certification is the employers' and public's best assurance that the required training has been given and, most importantly, that it has been effective—that learning has, in fact, taken place.

Remarkably, however, only 15 states and five (5) cities require crane operators to be certified or licensed. Only two (2) states require crane inspectors to be licensed. And there are no state or federal requirements for riggers to be licensed.

OSHA's regulations that govern the use of cranes have gone largely unchanged since they were issued in the early 1970's. They reference an American National Standard for cranes (ANSI B30.5) that was published in 1968 and has been out of print and unavailable for years. In the meantime, cranes have undergone a technological evolution that has transformed them into versatile and sophisticated

pieces of machinery, equipped in many cases with electronic control systems that would challenge the skills of a commercial airline pilot.

This situation has to change. OSHA recognized that much when, in the summer of 2003, it assembled 25 of the most qualified individuals in the industry and put them to work over a 12-month period to revise its outdated requirements. The Cranes and Derricks Advisory Committee (C-DAC), meeting once per month over an 11 month period, completed its work as requested, and delivered its report to the Department of Labor in August 2004. It is, by all assessments a remarkable document, developed in record time by industry experts without peer. To this date, despite numerous industry protests, and a unanimous endorsement for C-DAC's recommendations by OSHA's Advisory Committee on Construction Safety and Health (ACCSH), OSHA has not issued a proposed rule.

This rule needs to be published and implemented for many of the reasons we are assembled here today. Among its widespread provisions are accredited certification for crane operators, and heightened training and qualification for signalpersons, two essential elements, in our view, for improving safety on construction sites around the nation.

Calls for such measures are widespread with the industry. Just last week, a report (2) was published by the Center for Construction Research and Training (CPWR) that analyzes Bureau of Labor Statistics (BLS) data for 323 construction worker deaths attributable to crane accidents between 1992 and 2006. It makes eight (8) recommendations. No. 1 is for crane operators to be certified; no. 2 for riggers and signalpersons to be certified; and no. 3 for crane inspectors to be certified.

Mr. Chairman, reports have been released this year, in New York State and more recently in New York City, that would imply the existence of state and city exam design and administration that fall well below acceptable standards. It is alleged that licenses have been issued without appropriate candidate assessment that reflects competency by an individual in the area being assessed. This is far worse than no license at all, for it implies competency in an individual when, in fact, a candidate may have failed a test or even not have tested at all. Clearly, a testing instrument (such as a state or city exam), must be beyond reproach in both its design and administration for employers and the general public to have confidence in the process.

In this context, I would draw your attention to the fact that whenever I have talked this morning about "certification" I have done so with the qualification of "accredited certification." The organization I represent believes it is critical that any third-party certification body be subject to onsite audit of its policies and procedures to ensure it has developed and continues to administer written and practical examinations that are fair, valid and reliable.

Fortunately, there is a simple way for those who have a stake in construction safety matters to ensure only professionally developed certification is specified—and that is by ensuring that only certification bodies whose programs have been accredited by the American National Standards Institute (ANSI) are permitted to administer certification assessments. ANSI has developed a compliance program that meets the requirements of the ISO 17024 Requirements for Bodies Operating Certification of Persons and is the only accrediting body that requires onsite assessment of a certifying body as a condition of accreditation.

In closing, Mr. Chairman, I would like to thank you and this Committee for providing NCCCO an opportunity to present these recommendations for improving safety on worksites wherever lifting equipment is being used. NCCCO stands prepared to lend its expertise in assisting this Committee to achieve that goal.

REFERENCES

- Survey, May 2008, by the Specialized Carriers & Rigging Association (SC&RA), 2750 Prosperity Avenue, Suite 620, Fairfax, VA 22031.
McCann, Michael, PhD, and Gittleman, Janie, PhD. Crane Related Deaths in Construction and Recommendations for Their Prevention, The Center for Construction Research and Training, June 2008. 301/495-8525.

NCCCO PROGRAM STATUS JUNE 2008

NCCCO "BY THE NUMBERS":

NO. EXAMS ADMINISTERED: 325,000+
NO. OF WRITTEN TEST ADMINISTRATIONS CONDUCTED: 5,000+
NO. OF PRACTICAL TEST SITES APPROVED: 1,700+
NO. OF CRANES APPROVED FOR PRACTICAL EXAM TESTING: 5,000+
NO. OF STATES IN WHICH TESTING HAS BEEN CONDUCTED: 50

CERTIFICATIONS AVAILABLE:

MOBILE CRANE OPERATOR
 TOWER CRANE OPERATOR
 OVERHEAD CRANE OPERATOR
 RIGGER (2008)
 SIGNALPERSON (2008)
 ARTICULATING CRANE OPERATOR (2009)
ACCREDITATIONS:
 AMERICAN NATIONAL STANDARDS INSTITUTE / ISO
 NATIONAL COMMISSION FOR CERTIFYING AGENCIES
 NATIONAL SKILL STANDARDS BOARD
FEDERAL RECOGNITION:
 OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION
 DEPARTMENT OF ENERGY
OFFICIAL APPROVAL:
 DEPARTMENT OF EDUCATION
 DEPARTMENT OF DEFENSE
 DEPARTMENT OF VETERANS AFFAIRS
STATES ADOPTING CCO PROGRAM:
 WEST VIRGINIA (2001)
 HAWAII (2003)
 NEW JERSEY (2004)
 CALIFORNIA (2005)
 MONTANA (2005)
 NEW MEXICO (2007)
 MINNESOTA (2007)
 NEVADA (2007)
 UTAH (2007)
 WASHINGTON (2010)
 FLORIDA (PROPOSED)
 PENNSYLVANIA (PROPOSED)
 MARYLAND (PROPOSED)
 IOWA (PROPOSED)
NATIONAL INDUSTRY PARTNERSHIPS:
 AMERICAN SOCIETY OF CIVIL ENGINEERS (ASCE)
 AMERICAN SUBCONTRACTORS ASSOCIATION (ASA)
 ARTICULATING CRANE COUNCIL OF NORTH AMERICA (ACCNA)
 ASSOCIATED EQUIPMENT MANUFACTURERS (AEM)
 ASSOCIATED GENERAL CONTRACTORS OF AMERICA (AGC)
 CRANE MANUFACTURERS ASSOCIATION OF AMERICA (CMAA)
 INTERNATIONAL UNION OF OPERATING ENGINEERS (IUOE)
 SPECIALIZED CARRIERS & RIGGING ASSOCIATION (SC&RA)
 STEEL ERECTORS ASSOCIATION OF AMERICA (SEAA)

Chairman MILLER. No objection.

Mr. McKEON. Thank you, Chairman Miller, and I yield back the balance of my time.

[The statement of Mr. McKeon follows:]

Prepared Statement of Hon. Howard P. “Buck” McKeon, Senior Republican Member, Committee on Education and Labor

Good morning Chairman Miller, members of the Committee, and our panel of witnesses. We’re here this morning for a broad overview of OSHA’s efforts to ensure worker safety within the construction industry.

Given a number of recent high-profile crane accidents, I expect that we will also look specifically at the crane and derrick standard currently in place, as well as the pending update to that standard that began with a negotiated rulemaking process in 2004. It’s my understanding that OSHA sent a proposal to revise and update the crane rule to the Office of Management and Budget earlier this month for final review, and that we can expect to see final regulations in place before the end of the year.

Media reports have shown the devastation that can occur when construction equipment fails. As we have seen, this problem has not been isolated in one area of the country, but has had consequences nationwide.

Construction cranes, for instance, are powerful tools in today’s construction arena. They are being built higher, can carry larger loads, and—if used properly—improve the efficiency of a construction project. Cranes can eliminate many man hours for lifting and moving supplies and materials on the jobsite. They can also be among the most dangerous equipment for construction workers to be around. Constant vigilance is vital when workers are moving in and around functioning cranes.

Investigations into a number of recent crane accidents are still underway, and I expect these investigations to provide valuable information about how to prevent

such tragedies in the future. However, I am very troubled by allegations in The New York Times that the city's chief crane inspector has been accused of taking bribes to certify cranes as operational and workers as having successfully passed licensing exams. I request unanimous consent to include this article, dated June 7, 2008, in the hearing record.

Construction is vital to economic growth. But it's also an inherently dangerous industry, and that's why it's so important that steps be taken to help mitigate the risks and protect the workers. Because of the unique characteristics of construction job sites and their associated dangers, OSHA has put in place specific and extensive regulations directed at the construction industry. I look forward to learning more about those standards today.

We have before us a distinguished panel of experts including OSHA Administrator Foulke, who has taken over the development of the crane regulation I mentioned earlier in the midst of its development. I am hopeful he will provide us with an update on the crane rulemaking that has been developed, as well as the other specific safety standards applicable to the construction industry.

This hearing is an important first step to examine safety protections for workers in the construction industry, with a particular emphasis on the crane accidents that have drawn so much attention in recent months. I anticipate that the conclusion of OSHA's investigations will also help shape public policy on this important issue.

I would also request unanimous consent to include testimony for the record from Mr. Graham Brent, executive director of the National Commission for the Certification of Crane Operators. When this hearing was originally scheduled we were notified that it would focus exclusively on crane safety. Although the scope of the hearing has been expanded, I believe the record will be enhanced with inclusion of Mr. Brent's testimony.

Thank you Chairman Miller, and I yield back the balance of my time.

Chairman MILLER. I thank the gentleman.

I would like now to introduce our panel. First, we are joined by Mr. Ed Foulke, who is Assistant Secretary of Labor for OSHA. Prior to his current position, Assistant Secretary Foulke was a partner in the law firm of Jackson Lewis LLP where he practiced labor relations law. From 1990 to 1995, he served at the Occupational Health and Safety Commission, which he chaired from 1990 to 1994.

George Cole was an ironworker for over 40 years. His brother-in-law, Harold Billingsley, was killed in one of the recent Las Vegas construction accidents. Mr. Cole was previously the owner, operator and general manager of Uriah Enterprises, Inc., a steel fabrication and erection operation. Mr. Cole is a member of the Ironworkers Local 433.

Robert LiMandri is the acting Building Commissioner of the City of New York, a position he was named to in April of 2008. Commissioner LiMandri joined the Building Department in 2002, first serving as Deputy Commissioner of Operation and later as a First Deputy Commissioner.

Mike Kallmeyer is the senior vice president of Construction Services for Denier Electric Company in Columbus, Ohio. Mr. Kallmeyer has over 28 years of experience in the electrical field, having worked as an electrician, foreman, superintendant, project manager and department and division manager. He is currently responsible for managing the Construction Department at Denier Electric.

Mark Ayers is the president of the 3-million-member Building and Construction Trades Department, AFL-CIO. Prior to being elected to that position, Mr. Ayers was the Construction and Maintenance Department director for the International Brotherhood of Electrical Workers.

Welcome to all of you to the committee. We look forward to your testimony. Some of you have been here before, and you know we provide 5 minutes for your opening statements. And there will be a green light in front of you when you begin to testify. At 4 minutes, an orange light will come on, which is to suggest you might want to think about wrapping up, and then a red light at 5 minutes, which will end your testimony, but we obviously want you to be able to complete your thoughts in coherent sentences.

So thank you.

Secretary, we will begin with you.

**STATEMENT OF HON. EDWIN FOULKE, ASSISTANT SECRETARY
OF LABOR FOR OSHA**

Mr. FOULKE. Thank you Mr. Chairman, Ranking Member McKeon and members of the committee.

Thank you for the opportunity to appear here today to discuss OSHA's efforts to protect the safety and health of employees who work in our Nation's construction industry.

Construction is dangerous work, which requires employers to exercise constant vigilance against hazards, such as false and elevated positions, trenching and excavation cave-ins, entrapment in confined spaces, scaffolding collapses and electrocutions. Unlike other workplaces that have permanent ongoing operations, construction work sites are temporary and often involve dozens of different employers conducting different tasks at a single site. The dangers and hazards in the construction industry are well known, and the challenge for OSHA is to use the best mix of enforcement, outreach, standards, education and proper programs to protect employees.

Strong enforcement of safety and health standards is a vital component of our effective approach to construction safety. OSHA focuses on the four most common causes of occupational fatalities in the construction industry, namely falls; "struck bys"; "caught in between"; and electrocutions.

In fiscal year 2007 more than half of all the OSHA inspectors, both Federal and State plan inspections, were conducted in the construction industry, resulting in the issuance of 74,816 citations. Specifically, OSHA issued more than 24,000 citations for violations of the fall protection standard; 3,300 citations "for struck by" violations; and 3,500 citations for electrical violations. And since 2001, OSHA has issued 256 penalties in the construction industry with penalties in excess of \$100,000. Overall, OSHA has proposed more than three-quarters of \$1 billion in penalties for safety and health violations since 2001. During the same period OSHA has made 64 criminal referrals to the Department of Justice, which is more than any previous administration.

In fiscal year 2008, of the 57,000 violations issued so far, 80 percent have been characterized as serious, willful, repeat, or failure to debate, the highest percentage ever recorded by the agency. We are also effectively targeting our inspections, as violations have been found in 78 percent of the work sites OSHA has inspected.

In addition to a strong target enforcement program OSHA continually reviews its construction safety and health standards.

There are a number of regulatory changes under consideration, including the crane and derrick standard.

OSHA conducts national, regional, and local emphasis programs to target enforcement of particular hazards and industries. The success of this approach is demonstrated in New York where upwards of 12 employees were being killed annually in roadway work zones. After the establishment of a local emphasis program by OSHA, the number of work zone fatalities was reduced to one in 2007. Also, a national OSHA trenching initiative which began in 2003 has helped to reduce the annual number of trenching- and excavation-related fatalities by 46 percent.

Along these same lines training is a critical component of an effective accident prevention program. The OSHA Training Institute has focused both on training our compliance officers to identify the hazards most common at construction work sites and on our train-the-trainer program, in which individuals who successfully complete the required training courses are authorized to conduct training programs in construction. Over 1.6 million construction participants have been trained by these trainers since 2004.

An example of how this training has saved lives occurred after a construction employee in Kansas attended one of these training courses and learned to don and adjust a full body harness. He and a coworker later survived a fall on the job because of their understanding of how to properly use this critical safety equipment.

The construction industry employs a large number of Spanish-speaking employees. OSHA continues to develop and distribute Spanish-language material, such as a Spanish-English construction dictionary, public service announcement, quick cards and fact sheets, all of which are available on the agency's Spanish Web site. These materials help Spanish-speaking employees identify workplace hazards.

OSHA makes use of a variety of effective cooperative programs with employers, trade associations, labor organizations and others to provide safety and health in the construction agency. OSHA's voluntary protection program has 113 construction participants across the Nation. There are also 140 strategic partnerships with construction companies, which is more than 80 percent of all partnerships.

I want to make it clear, however, that while the agency offers technical assistance to employers to help comply with OSHA standards, as well as recognizing employers for implementing exemplary health and safety systems, compliance with OSHA safety and health standards is mandatory, not voluntary. There is no such term or practice as voluntary compliance. Every employer is responsible for providing employees a safe and helpful workplace free of hazards. OSHA is committed to enhancing construction safety and to continue to provide employers and employees with safety information and to ensure that work sites comply with existing safety regulations.

I can assure the committee that construction safety is a top priority for OSHA and that we are striving to ensure that all employees return safely to their families and friends at the end of each and every workday.

Thank you, Mr. Chairman, and I would be happy to answer any questions that you may have.

[The statement of Mr. Foulke follows:]

**Prepared Statement of Hon. Edwin G. Foulke, Jr., Assistant Secretary,
Occupational Safety and Health Administration, U.S. Department of Labor**

Mr. Chairman, Ranking Member McKeon, and Members of the Committee: Thank you for the opportunity to appear today to discuss OSHA's comprehensive efforts to protect the safety and health of employees who work in our nation's construction industry.

To accomplish its mission of saving lives and reducing injuries and illnesses, OSHA utilizes a balanced approach which includes: 1) strong, fair, and effective enforcement; 2) safety and health standards and guidance; 3) training and education; and 4) cooperative programs, compliance assistance and outreach. The Occupational Safety and Health Act (the OSH Act) enacted by Congress in 1970 stipulates that employers are ultimately responsible for providing a safe and healthful work environment. OSHA has a critical role in helping employers with their responsibilities, and utilizes all components incorporated in its balanced approach.

Since 2001, as part of its strong enforcement program, OSHA proposed more than three-quarters of a billion dollars in penalties for safety and health violations and made 64 criminal referrals to the Department of Justice, which represents more than 30 percent of all criminal referrals in the history of OSHA and more than any previous Administration. In Fiscal Year (FY) 2008, of the almost 57,000 violations issued so far, 80 percent have been categorized as serious, willful, repeat or failure-to-abate, the highest percentage ever recorded by the agency. We are also effectively targeting our inspections—78 percent of the worksites we inspected had violations. Our approach is working. All three key indicators—injury, illness and fatality rates—are all at the lowest levels in the nation's history. Most importantly, the overall fatality rate in construction has declined by 18 percent since 2001. These achievements highlight the Administration's commitment and success in protecting the safety and health of the nation's workforce.

Even with all these achievements, OSHA recognizes that there are still safety and health concerns to be addressed at workplaces, including construction sites. We must remember that a successful construction project is one that it is done safely and without loss of life. One fatality is one too many.

According to data from the Bureau of Labor Statistics (BLS) Current Population Survey, employment in the construction industry averaged approximately 11.9 million in 2007, with approximately 16 percent of the total classified as unincorporated self-employed. Since FY 2003, 78 percent of all OSHA fatality investigations in the construction industry have been conducted on companies with 25 or fewer employees. According to the National Institute for Occupational Safety and Health (NIOSH), 80 percent of the construction businesses have fewer than 10 employees. Construction is dangerous work which requires constant vigilance against hazards such as falls from elevated positions; trenching and excavations; confined spaces; scaffolding; electrocution and exposure to dust and noise. The dangers in construction work are well known and the challenge for OSHA is to use the best mix of enforcement, outreach, education, and cooperative programs to address construction workplace hazards.

Another challenge presented to OSHA by the construction industry is the nature of this industry. Unlike other workplaces that have permanent and ongoing operations, the work performed at construction sites is highly dynamic, often involving dozens of different employers at a single construction site, whether it is a large industrial project or a residential home. It is in this complex and challenging worksite that OSHA works with employers, employees, and their representatives to improve safety and health.

OSHA is familiar with these challenges and in response, has a multi-faceted approach to reducing construction-related accidents and preventing exposures to health hazards. OSHA focuses on the four most common causes of occupational fatalities in the construction industry: falls; "struck by"; "crushed by"; and electrocutions. In addition to a strong, targeted enforcement program, OSHA continues to revise and update its standards, create meaningful compliance assistance resources, and provide outreach, education and training. OSHA is committed to protecting employees by identifying hazards, citing employers when standards are violated, and educating stakeholders on ways to reduce the hazards associated with construction work across the country. OSHA also helps employers to provide safer working envi-

ronments by engaging in a balanced approach of enforcement and outreach to key stakeholders to collaborate on important safety and health issues.

OSHA: Strong Enforcement Program for Construction

Strong enforcement of safety and health standards is a component of our effective approach on construction safety. In FY 2007, approximately 51 percent of total OSHA inspections, both federal and State Plan inspections, were conducted in the construction industry. More than 67 percent of all federal and about 74 percent of State Plan construction inspections were programmed inspections. In FY 2007, OSHA issued 74,816 citations just in the construction industry. Since 2001, OSHA has issued 256 significant enforcement cases—those with penalties of at least \$100,000—in the construction industry. As these statistics show, OSHA enforcement is strong and enforcement of our safety and health standards is a top priority of the agency.

OSHA has addressed the top four causes of fatalities found in its Integrated Management Information System in several ways. The agency has been aggressive in issuing citations and penalties for violations of the standards that address these key hazards. In FY 2007, for fall protection violations, we issued 24,358 citations for a total of \$33.5 million in penalties; for struck-by and crushed-by, we issued 3,317 citations for a total of \$9.1 million in penalties; for electrical violations, we issued 3,566 citations for a total of \$2.4 million in penalties.

Enhanced Enforcement Program

In addition to our standard enforcement efforts, OSHA has created other enforcement mechanisms to focus on those companies that ignore their obligations under the OSH Act. The Enhanced Enforcement Program (EEP) complements the agency's targeted approach to enforcement by addressing employers who, despite OSHA's enforcement and outreach efforts, ignore their obligations to provide a safe and healthful work environment. The program looks at an employer's national inspection history, not just the violations at a single facility, to determine whether failure to comply with OSHA safety and health standards is a problem at one facility or job site, or systemic throughout the entire company. If an employer meets the criteria for EEP, it will be subject to much greater enforcement scrutiny from OSHA, which may ultimately result in court enforcement of citations or criminal referrals. This program has been used in the construction industry to focus resources on companies that fail to adequately protect their employees. There were 1,189 EEP construction cases, which represents almost half of all OSHA EEP cases. After four years of implementation, OSHA revised the EEP program to focus greater enforcement emphasis on those employers that have a history of violations with OSHA (including history with the State Plans.) The revised program became effective on January 1, 2008.

Special Emphasis Programs

OSHA conducts National, Regional, and Local Emphasis Programs (NEPs, REPs, and LEPs) that target particular hazards or industries such as trenching, amputations, and refining. These programs combine enforcement and outreach efforts to address a particular safety and health issue. OSHA has completed a number of successful emphasis programs focused on such topics as fall hazards in construction, mobile crane operations, bridge and tunnel construction, silica and road hazards, falls relating to scaffolding, and energized power lines.

Hexavalent Chromium

OSHA promulgated a standard on exposures to hexavalent chromium on February 29, 2006 which reduced the permissible exposure limit (PEL). Construction employees are primarily exposed to hexavalent chromium during the welding/cutting of stainless steel, removing paint from existing structures such as bridges, and during refractory restoration.

Portland Cement

OSHA implemented new Portland Cement Inspection Procedures at construction sites as part of its settlement of a legal challenge to the new Hexavalent Chromium Standard by the Building and Construction Trades Department, AFL-CIO, Laborers' International Union of North America, and International Brotherhood of Teamsters.

Preventing Falls

In 2001, OSHA issued a new steel erection standard that modified a provision to allow the use of nets instead of a fully planked floor. Specifically, the new provision provides that the employer has the option of either maintaining a fully planked/decked floor or maintaining nets, every two stories. In 2002, stakeholders asked

OSHA to permit the use of 100 percent fall protection instead of using planking or nets. They argued that planking is not effective fall protection and that 100 percent tie-off is safer than allowing connectors and deckers to work without personal fall protection above a planked floor. In response, OSHA issued a compliance policy stating that, if an employer used 100 percent fall protection, including for connectors and deckers, the failure to comply with this provision would be considered de minimis.

OSHA agrees with the rationale that 100 percent fall protection provides greater protection than what is required by the standard. The standard issued in 2001 does not require connectors and deckers working less than 30 feet from the ground to use fall protection. Under the 2001 standard, if an employer chooses to have a fully planked floor rather than a net 30 feet below the employees, which is allowed by the floor/net provision, those employees would be exposed up to a 30 foot fall to a planked floor. In contrast, under the de minimis policy, all employees would be protected by fall protection at all times. It is the position of OSHA that greater safety overall is achieved by employers using the de minimis policy.

Preventing Construction "Struck By" Accidents

An OSHA NEP addressing roadway work zone safety was created after the success of a local initiative that began in OSHA's Parsippany, New Jersey office. This collaborative program brings together state transportation and police authorities, as well as local unions, in cross-training efforts to improve hazard identification and correction at highway job sites. The success of this approach is reflected in New Jersey, OSHA data indicates that where 8-12 employees were being killed in roadway work zones annually; the number of workzone fatalities there was reduced to one in 2007.

Also, OSHA updated the Signs, Signals and Barricades rule to improve protection for highway workzone employees. That standard had previously incorporated by reference the 1971 version of Part VI of the Department of Transportation's Manual on Uniform Traffic Control Devices (MUTCD). On September 12, 2002, OSHA updated that rule so that now employers must at least comply with the 1993 version of the MUTCD; they have the option of complying with the Millennium version. This change has upgraded requirements for a variety of warning and traffic control devices.

In addition, OSHA is conducting a study of struck-by accidents to determine patterns and root causes.

Trenching Initiative is Successful

The OSHA Trenching Initiative, which was begun in 2003, has proven to be successful. The trenching initiative is a large scale effort to raise awareness of trenching hazards and basic trench safety practices. Working through cooperative programs such as the American Pipeline Contractors Association, and with other stakeholders, 500,000 Trenching Quickcards, 50,000 Trenching Posters, and NIOSH's CD Trench Safety Awareness Training have been distributed. Most of these training and education materials, such as the Quickcards, are designed specifically for use by the many small contractors that are engaged in trenching work. OSHA data indicates that the Initiative has helped to reduce the annual number of trenching and excavation related fatalities by 46 percent.

Preventing Electrocutions in Construction

A National Strategic Partnership between OSHA and the Electrical Transmission and Distribution Construction Contractors, trade associations, and International Brotherhood of

Electrical Workers was originally signed in August 2004 and continues today. The partners represent the interests of more than 70 percent of the industry. The partnership's tri-level leadership (CEO's, corporate safety, employees/supervisors) harnesses industry expertise with that of OSHA to make significant progress towards the Partnership's goals: reduction of fatalities through data analysis, training, and best practice development/implementation.

Initially, shared data analysis drove the partners to develop and implement best practices; they continue to do so. The analysis also resulted in the development and delivery of an industry-specific OSHA 10-hour outreach training program. The course has reached more than 12,000 employees, foremen and general foremen. Most recently the partners started delivering their new Supervisory Leadership and Outreach Training course. It has reached more than 120 supervisors to date. OSHA data collected indicates that the training efforts and the implementation of best practices have helped accomplish the Partnership's overall goal of reducing fatalities, which has shown remarkable progress by declining from 67.24 per 100,000 employees in 2003 to 24.55 in 2007, a 63.5 percent reduction.

Unprecedented Levels of Hispanic Outreach Activities

OSHA continues to make workplace safety and health for Hispanic employees a priority. The agency has a Diverse Workforce Issues Group that focuses on outreach, training and education issues through various means, including the OSHA—Mexican Embassy Letter of Agreement (LOA), several construction alliances, including alliances with the International Association of Foundation Drilling, the American Pipeline Contractors Association, the American Society of Safety Engineers, the National Association of Home Builders, and the Roadway Work Zone Safety and Health Partners, and OSHA's On-site Consultation Program. There is active participation by our stakeholders, including foreign consulates, industry, professional associations, organized labor, community faith-based organizations, and small business employers to address the safety and health issues for this hard to reach segment of the work force.

OSHA continues to develop and distribute Spanish-language materials such as a Spanish-English construction dictionary, public service announcements, posters, QuickCards, Fact Sheets, and many other publications, which are available on the Agency's Spanish version Web site, OSHA En Espanol. In addition the Agency has developed Spanish-language eTools, like La Prevención De Fatalidades ("The Prevention of Deaths" in construction), which are also available on OSHA En Espanol.

Training for Construction Employees: OSHA Construction Outreach Training Program

The OSHA Outreach Training Program is a "train-the-trainer" program in which trainers who successfully complete the required OSHA Training Institute trainer course are authorized to conduct 10- and 30-hour training programs in construction and to give cards provided by the OSHA Training Institute to their students. This "train-the-trainer" program is OSHA's primary initiative for training employees in the basics of occupational safety and health hazard recognition and avoidance.

The OSHA Construction Outreach Training Program is a voluntary program. However, its considerable growth has been driven through industry groups such as the building trades, contractors, employer associations, and specific companies. The endorsement by these groups has resulted in the requirement of the training as a condition of employment for their employees or members. Over 1.6 million construction participants have been trained by these trainers since 2004.

OSHA Cooperative Programs

OSHA makes use of a variety of effective cooperative programs which engages various stakeholders such as employers, organizations, organized labor, and others to improve safety and health in the construction industry. The agency's cooperative programs include Alliances, Strategic Partnerships, Voluntary Protection Programs (VPP), and On-Site Consultation programs to name a few.

OSHA's VPP has 113 construction participants across the nation. There are 146 Strategic Partnerships with construction companies which account for more than 80 percent of all partnerships. OSHA's newest program, OSHA Challenge, "A Roadmap to Safety and Health Excellence", has 72 participants. These programs have demonstrated that effective safety and health management systems can make a significant difference by helping to reduce injuries and illnesses by 20 percent to 80 percent below their industry average according to BLS data comparisons. In addition, there are 14 national construction Alliances. OSHA offers a number of opportunities for businesses, trade organizations, labor unions, universities and state and local governments to work together to protect employees in the construction industry by identifying and addressing workplace hazards, providing input on proposed rules, enhancing safety and health management systems, and promoting a national dialogue on the importance of protecting construction employees from hazards.

I want to make it clear, however, that, while the agency offers technical assistance to employers to help them comply with OSHA standards as well as recognize employers for implementing exemplary safety and health management systems, compliance with OSHA safety and health standards is not voluntary. There is no such term or practice as "voluntary compliance."

Pending Rulemakings

OSHA recognizes that a dynamic industry requires that we continuously evaluate regulations and standards. The following four items on OSHA's current regulatory agenda are particularly applicable to the construction industry.

Cranes:

Several recent fatal crane accidents have highlighted the importance of crane safety. OSHA estimates that there are approximately 96,000 construction cranes in use each year in the United States. The recent crane accidents in New York, Miami,

and Annapolis involved tower cranes. According to OSHA accident investigation data, in the period from 2000 to 2007, there were a total of 20 incidents involving tower cranes which resulted in 10 fatalities.

OSHA is proactively engaged to improve crane safety. The Administration is in the final stages of preparing a proposed rule to update and improve its current construction cranes and derricks standard. The rule is being developed through a negotiated rulemaking process which provides opportunities for all stakeholders to provide input.

The cranes and derricks proposed rule will comprehensively address the hazards associated with the use of cranes and derricks in construction, including tower cranes. Developing the proposal is a complex, large-scale project which requires diligent and thoughtful considerations of all the technical issues. Pursuant to statutory requirements, OSHA has completed the regulatory flexibility analysis, small business review, paperwork burden analysis, and economic impact analysis of the proposed rule.

In addition to rulemaking, OSHA is highly engaged in a number of activities designed to heighten awareness of best practices and the construction hazards associated with crane use. OSHA's regional offices have established Alliances and partnerships, participated in numerous training activities, and provided information and training as part of proactive outreach programs.

An increasing number of Compliance Safety and Health Officers (CSHOs) are attending OSHA Training Institute's (OTI) #2050 Cranes and Rigging Safety for Construction Course, which focuses on crane safety. Over the past 8 years, 111 Federal OSHA and 187 State plan employees have completed this course. OTI has also conducted a Web-based seminar in which over 670 CSHOs and other agency staff received crane safety training. Some OSHA employees in the field have also taken advantage of training opportunities provided by public and private sector entities. OSHA regional offices, such as Region V (Chicago), are organizing training events in conjunction with local unions and industry groups. The Region I office (New England) has conducted eleven different training events focused on crane safety. Regional offices have also recognized the need for additional efforts specific to crane use in urban and high-rise construction projects. Region I implemented a Local Emphasis Program for cranes in early FY 2008; Region IV is engaged in outreach activities on crane hazards with industry stakeholders in Florida; Region V has a Local Emphasis Program in high-rise construction in the Chicago area, and CSHOs in that region are using a Crane Initiative Questionnaire to focus attention on specific crane hazards. OSHA regional offices also are working with local building departments to exchange crane safety information.

OSHA is currently developing a national Crane Safety Initiative that will, with the help of labor and industry stakeholders, heighten awareness of key crane safety hazards and safe practices.

Finally, OSHA compliance officers inspect employer compliance with the OSHA construction crane standard as part of their inspections of construction sites. OSHA has detailed requirements for crane safety, which employers are required to follow. The requirements of the current crane standard include operational safety; a general requirement for employers to inspect construction cranes prior to each use; an annual inspection that must be "thorough" and documented, and that defects or deficiencies discovered in any inspection be repaired before the crane may be used; and requirements that employers conduct tower crane inspections prescribed by the manufacturer. Currently, there is no federal program under which OSHA is specifically charged with inspecting all construction cranes. Nor does OSHA currently require certification for crane operators.

After the March 2008 tower crane collapse in New York City, OSHA increased inspections of large construction sites there, since those are the sites where cranes are most likely to be used. Similarly, the State Plan partner, New York-OSHA, staff increased outreach efforts to address crane safety. OSHA's National Office deployed an engineering expert to the accident sites in New York and Miami as part of the agency's on-going investigations of those accidents.

Power Generation, Transmission and Distribution:

On June 15, 2005, OSHA published a proposed rule to revise the general industry and construction standards for electric power generation, transmission, and distribution work and for electrical protective equipment. Public comments were received, hearings were held, and the final posthearing briefs were due on July 14, 2006.

The proposed standard included revised minimum approach distance tables. Those tables limit how close an employee (or a conductive object he or she is contacting) may get to an energized circuit part. After the rulemaking record on the proposal

closed, the technical committee responsible for developing the tables in the consensus standards on which the proposal was based discovered what they believe is an error in their calculation of minimum approach distances for certain voltages. OSHA will be reopening the record on this proposal for a period of 60 days to obtain comments related to the affected minimum approach distances.

Confined Spaces:

Fatality and injury data, OSHA enforcement experience, and advice from OSHA's Advisory Committee for Construction Safety and Health indicate that the existing construction standard for confined spaces does not adequately protect construction employees in confined spaces from atmospheric and physical hazards. The existing construction standard only requires employers to instruct their employees about confined-space hazards, and comply with other OSHA construction standards that address confined-space hazards. On November 28, 2007, the agency issued a proposed rule for confined spaces in construction that is estimated to prevent 6 fatalities and 900 injuries.

The proposed rule addresses construction-specific needs in several ways. It uses a comprehensive, step by step approach to confined space safety by setting out how to assess the hazards, classify the space and implement effective procedures to protect employees. Since construction sites often have a number of employers working simultaneously, the proposed rule would require controlling contractors to coordinate confined space operations. Upstream engulfment hazards, which are typical in sewer-type spaces, are addressed by a requirement for an early warning system. Also, because conditions in these spaces during construction can change rapidly and unexpectedly, continuous monitoring for hazardous atmospheres would be required.

We are currently analyzing the public comments that were submitted and have scheduled a hearing for July 22, 2008.

Hearing Loss in Construction:

OSHA is continuing work on a new hearing conservation rule for construction. The current requirement requires employers to implement an effective hearing conservation program but contains no details on what such a program must include.

We are continuing the research and analytical efforts necessary to move this rule-making forward. These include reviewing effective hearing conservation programs and state and international noise standards, and researching noise control methods such as reduced noise hand tools.

Some of the issues under study that have added to the complexity of promulgating a rule include the seasonal nature of many construction jobs, the high employee turnover rate on many construction worksites, the temporary nature of many construction worksites, and the amount of noise generated by some commonly used construction equipment.

OSHA is committed to enhancing construction safety, to continuing to provide employers and employees with safety information, and to ensuring that worksites comply with existing safety regulations. I assure the subcommittee that construction safety is a top priority for OSHA and that we are striving to ensure that all employees return safely to their families and friends at the end of every work day.

Thank you Mr. Chairman. I would be happy to answer any questions.

Chairman MILLER. Thank you.
Mr. Cole.

STATEMENT OF GEORGE COLE, FORMER IRONWORKER

Mr. COLE. Good morning, Chairman Miller, and other distinguished members of this committee.

My name is George Cole. I am an ironworker, retired. For 42 years I have been in the business.

I never thought I would be testifying that OSHA has failed to enforce safety standards for steel erection. I deeply regret that I am here today on behalf of my deceased brother-in-law, Rusty Billingsley, who plunged 59 feet to his death on the City Center project in Las Vegas.

With me today is my wife, Rusty's sister, Monique Billingsley Cole.

To further add our overwhelming grief, after deciding on a \$13,500 fine because the accident could have been prevented, Nevada OSHA then met privately with the company and withdrew all citations and fines, stating that Rusty's employer bore no responsibility for his death.

I am here today on behalf of my family and ironworkers throughout the country. Rusty's death was not his fault. There are two problems here: the unsafe conditions at the workplace; and OSHA's failure to enforce its own standards as they were written. We need assistance to confront OSHA on their failure to enforce the safety standards for steel erection and their misuse of compliance directives that have effectively removed vital safety provisions for ironworkers.

The compliance directive issued by Federal OSHA, violates the safety regulations contained in OSHA's Subpart R, Steel Erection Standard Final Rule. OSHA standards require a decked floor every two floors or 30 feet, whichever is less. The compliance directive eliminated this safety provision for Rusty. This was never more evident than on October 5, 2007, when Rusty was permitted to fall over 59 feet to his death. Because of this directive, on that day, I lost my brother and I gained a statistic.

The OSHA photos of his crushed and lifeless body will forever overshadow his energetic loving life and a kind generous man. On several occasions, representatives for the Ironworkers International and contractor associations have met with Mr. Edwin Foulke, Assistant Secretary of Labor, and his staff in good faith to resolve these issues.

OSHA was strongly urged to rescind certain items contained in this compliance directive that removed safety provisions and create unsafe working conditions for ironworkers. Despite repeated warnings to Mr. Foulke, from industry stakeholders, members of his own staff and the former Deputy Assistant Secretary of Labor, Mr. Foulke has refused to rescind certain items contained in his compliance directive.

Two weeks ago, Mr. Foulke visited Las Vegas and requested to meet with general contractors and subcontractors regarding the recent fatalities in Las Vegas. Why would Mr. Foulke come to Las Vegas to talk about fatalities and workplace safety when he has refused to rescind the OSHA compliance directive that has been the center of the controversy in Las Vegas?

I was informed that Mr. Foulke refused to rescind certain Federal OSHA compliance directives but agreed that he would consider suspending them until further notice. Family members, friends, and brother ironworkers are disappointed that Mr. Foulke left Las Vegas without taking action on this compliance directive that contributed to the tragic death of my brother-in-law, Rusty.

I am extremely pleased that Nevada OSHA has formally denounced items contained in the Federal OSHA compliance directives. After a thorough review, Nevada OSHA officials concluded that certain OSHA compliance directives do not provide equivalent protection. State plan officials refer to OSHA's compliance directives as "underground rulemaking" when Federal OSHA intends to "make policy" without going through a formal rulemaking process. This is a disservice to the stakeholders in the steel industry who

rely on OSHA to provide constant enforcement and interpretation of safety regulations.

Nevada now joins other State OSHA plans that have refused to adopt these compliance directives. The working men and women that build America look to OSHA to enforce the safety regulations for our protection. We are shocked and disappointed that OSHA would issue compliance directives that remove safety provisions for the steel erection industry that has been considered a high-hazard industry. Today these compliance directives continue to be a deadly hazard to ironworkers and a source of confusion, costly job site delays, and unnecessary litigation.

On behalf of Rusty, my family and ironworkers throughout the country, we seek your assistance to question Mr. Foulke on OSHA's current policy to not enforce the current safety standards for steel erection and their misguided compliance directive that removed vital safety provisions for ironworkers. I hope my testimony before you today will prevent future fatalities and help bring closure to our family. We believe that Mr. Foulke is accountable, and OSHA should be issued a willful citation for knowingly and intentionally violating their own standards.

Thank you for not allowing Rusty's death to be in vain.

[The statement of Mr. Cole follows:]

Prepared Statement of George Cole, Former Ironworker

Good morning Chairman Miller and other distinguished members of this Committee. My name is George Cole, I have been an Ironworker for 42 years and I never thought I would be testifying that OSHA has failed to enforce safety standards for steel erection. I deeply regret that I am here today on behalf of my deceased brother-in-law, Harold "Rusty" Billingsley who plunged 59 feet to his death on the Project City Center in Las Vegas. To further add to our overwhelming grief, OSHA withdrew all citations and fines. I am also here today on behalf of my family and Ironworkers throughout the country. We need your assistance to confront OSHA on their failure to enforce the safety standards for steel erection, and their misuse of Compliance Directives that have effectively removed vital safety provisions for Ironworkers.

The Compliance Directive issued by Federal OSHA violates the safety regulations contained in the OSHA Subpart R—Steel Erection Standard Final Rule. The OSHA standard requires a decked floor every 2 floors or 30 feet whichever is less, and the Compliance Directive eliminated this safety provision for Rusty.

This was never more evident than on October 5, 2007 when Rusty was permitted to fall over 59 feet to his death, because of this Directive. On that day I lost my brother and gained a statistic. The OSHA photos of his crushed and lifeless body will forever overshadow the energetic and fun loving life, of this kind and generous man.

On several occasions, representatives from the Ironworkers International and contractor associations have met with Mr. Edwin Foulke, Assistant Secretary of Labor and his staff in good faith to resolve this issue. OSHA was strongly urged to rescind certain items contained in their Compliance Directive that removed safety provisions and created unsafe working conditions for Ironworkers. Despite repeated warnings to Mr. Foulke from industry stakeholders, members of his own staff, and the former Deputy Assistant Secretary of Labor, Mr. Foulke has refused to rescind certain items contained in the Compliance Directive.

Two weeks ago Mr. Foulke visited Las Vegas and requested to meet with general contractors and subcontractors regarding the recent rash of fatalities in Las Vegas. Why would Mr. Foulke come to Las Vegas to talk about fatalities and workplace safety when he has refused to rescind OSHA Compliance Directives that have been at the center of controversy in Las Vegas? I was informed that Mr. Foulke refused to rescind certain Federal OSHA Compliance Directives but agreed that he would consider "suspending them until further notice". Family members, friends and brother Ironworkers are disappointed that Mr. Foulke left Las Vegas without taking any action on the Compliance Directive that contributed to the tragic death of my brother-in-law, Rusty.

I am extremely pleased that Nevada OSHA has formally denounced items contained in the Federal OSHA Compliance Directive. After a thorough review, Nevada OSHA officials concluded that certain OSHA Compliance Directives do not provide "equivalent protection". State Plan Officials refer to OSHA Compliance Directives as "underground rulemaking" when Federal OSHA intends to "make policy" without going through a formal rulemaking process. This is a disservice to the stakeholders in the steel erection industry who rely on OSHA to provide consistent enforcement and interpretation of safety regulations. Nevada now joins other State OSHA Plans who have refused to adopt these Compliance Directives.

The working men and women that build America look to OSHA to enforce the safety regulations for our protection. We are shocked and disappointed that OSHA would issue Compliance Directives that remove safety provisions for the steel erection industry that is considered a "high hazard industry". Today, these Compliance Directives continue to be a deadly hazard to Ironworkers and a source of confusion, costly jobsite delays, and unnecessary litigation.

On behalf of Rusty, my family, and Ironworkers throughout the country, we seek your assistance to question Mr. Foulke on OSHA's current policy to not enforce the current safety standards for steel erection, and their misguided Compliance Directives that remove vital safety provisions for Ironworkers.

I hope my testimony before you today will prevent future fatalities and help bring closure to our family. We believe that Mr. Foulke is accountable, and OSHA should be issued a willful citation for knowingly and intentionally violating their own standards.

Thank you for not allowing Rusty's death to be in vain.

Chairman MILLER. Thank you.
Commissioner LiMandri.

**STATEMENT OF ROBERT LIMANDRI, ACTING BUILDING
COMMISSIONER, CITY OF NEW YORK**

Mr. LIMANDRI. Good morning Chairman Miller, Ranking Member McKeon, distinguished members of the Education and Labor Committee.

Thank you for this opportunity to discuss construction safety regulation and enforcement. And frankly, the previous testimony really hits home today.

Like yourselves and like many Americans, I am deeply troubled by the recent construction accidents in New York City and across the Nation. While we all know construction is inherently dangerous, there is no excuse for failing to minimize the risk.

Since Mayor Bloomberg took office in 2002, the department has set high expectations for integrity and accountability; raised construction safety standards for the industry; and improved our own enforcement of existing regulations.

Advancing construction safety demands attention from all levels of government and requires a steadfast commitment from industry. We have 975,000 buildings under our jurisdiction and issue approximately 170,000 permits each year. We have undertaken an aggressive enforcement effort to promote worker safety, but it is simply impossible for our inspectors to be at every job site all the time.

Construction safety requires dedication from all responsible parties in government, contractors, architects and engineers, owners and workers. Everyone has this responsibility.

In order to meet the challenge of enhancing construction safety, the Department of Buildings has undertaken a seven-pronged approach: First, we nearly doubled the size of the agency and focused more resources to construction safety. Second, we sought new and

improved regulatory oversight and enforcement tools. Third, we created a new enforcement program to stop problems before they become serious. Fourth, we supported an aggressive criminal prosecution of repeat offenders. Five, we are currently conducting a top-to-bottom review of high risk construction areas to further enhance safety. Six, we are holding all parties accountable. And seven, we are focusing on education for construction workers and requiring site safety managers in more locations in order to have a constant safety presence.

In terms of resources, we are now better able to target high-risk areas of construction thanks to increased staffing under Mayor Bloomberg and the City Council. In our special new enforcement plan alone, we have identified 144 dedicated engineers, architects, inspectors, lawyers and support staff working to raise construction safety standards and to aggressively enforce them.

Expanding our regulatory and enforcement tools has also been a crucial component to advancing construction safety. On July 1st of this year the new New York City construction codes go into effect. They put construction safety front and center and replace the city's outdated 1968 building code. We are also launching our construction analysis and oversight plan, an unprecedented top-to-bottom examination of crane, concrete and excavation operations, to improve industry practices, government oversight to minimize the risk.

On the enforcement front, we are actively issuing stop-work orders, a particularly effective tool that we have in our arsenal that allows us to immediately halt unsafe construction.

Finally, earlier this month, Mayor Bloomberg and members of the City Council announced an aggressive legislative package that would enable the department to track various types of contractors by their safety records. Overall, it has been an enormous but necessary ongoing effort.

However, improving construction site safety also requires the Federal Government to take an active and aggressive role. I am proud of New York City's partnership with OSHA, as much of our progress would not have been possible without their dedicated staff.

Yet it is clear that had OSHA had more additional staff, our achievements would be far greater. I urge Congress to follow New York City's lead in allocating increased funding to construction safety and provide additional resources to OSHA so they can deploy the construction safety inspectors they so desperately need.

Right now, we have approximately 7,500 active new building construction sites and 8,000 additional major alterations. As was indicated earlier, OSHA has a minimal number of compliance officers. They simply cannot cover enough ground.

While OSHA inspectors do their best to respond to emergencies and complaints, they lack the critical enforcement tool I mentioned earlier, the stop-work order. Without authority to halt unsafe work when they find it, OSHA inspectors can only issue fines.

I want to get to cranes. The tower cranes that build our skyscrapers are like airplanes: They cross State lines. They demand regular maintenance and need skilled operators. They have interchangeable parts. We first support the first modernization of the

crane OSHA rules. Because these cranes move across State lines, it is important that the Federal guidelines be updated. In addition, what we would like to see is an invaluable black box technology to be required in every tower crane across the country. Third, cranes that have these interchangeable structural components must be clearly labeled and must be able to track over their lifetime. And fourth, we are strengthening and expanding tracking and testing requirements for tower crane components.

We can do a lot in New York City, but the entire Nation deserves better. The time is now to make meaningful changes. Facilitating development does not require turning a blind eye to safety. In New York City, we will not.

Thank you.

[The statement of Mr. LiMandri follows:]

**Prepared Statement of Robert LiMandri, Acting Buildings Commissioner,
City of New York**

Good morning Chairman Miller, Ranking Member McKeon, Congresswoman Clarke and members of the Education and Labor Committee. Thank you for this opportunity to discuss construction safety regulation and enforcement.

Like yourselves and like many Americans, I am deeply troubled by recent construction accidents in New York City and across the nation. While we all know construction is inherently dangerous, there is no excuse for failing to minimize that risk. The Department of Buildings recognizes this, and we are working hard to advance construction safety in New York City.

Since Mayor Bloomberg took office in 2002, the Department has set high expectations for integrity and accountability, raised construction safety standards for the industry and improved our own enforcement of existing regulations.

Advancing construction safety demands attention from all levels of government and requires a steadfast commitment from industry. The New York City Buildings Department has 975,000 buildings under its jurisdiction and issues approximately 170,000 permits each year. We have undertaken an aggressive effort to promote worker safety, but it is simply impossible for our Inspectors to be at every site at all times. Construction safety requires dedication from all responsible parties—government, contractors, architects, engineers, developers, owners and workers. Everyone has a responsibility.

In order to meet the challenge of enhancing construction safety, the Department of Buildings has undertaken a seven-pronged approach—(1) we nearly doubled the size of the agency and focused more resources to construction safety; (2) we sought new and improved regulatory oversight and enforcement tools; (3) we created a new enforcement program to stop problems before they become serious; (4) we supported aggressive criminal prosecution of bad actors and repeat offenders; (5) we are currently conducting a top to bottom review of high risk construction areas to further enhance safety; (6) we are holding all parties accountable; and (7) we are focusing on education for construction workers and requiring site safety managers in order to have a constant safety presence.

In terms of resources, we are now better able to target high-risk areas of construction, thanks to increased staffing under Mayor Bloomberg and City Council. In our new Special Enforcement Plan alone, we have 144 dedicated staffers working to raise construction safety standards and to aggressively enforce them.

Expanding our regulatory and enforcement tools has also been a crucial component to advancing construction safety. On July 1st the New NYC Construction Codes go into effect. They put construction safety front and center and replace the City's outdated 1968 Building Code. We are also launching our Construction Analysis and Oversight Plan, an unprecedented top-to-bottom examination of crane, concrete and excavation operations to improve industry practices and government oversight to minimize risk. On the enforcement front, we are actively issuing Stop Work Orders—a particularly effective tool we have in our arsenal that allows us to immediately halt unsafe construction. Finally, earlier this month, Mayor Bloomberg and members of City Council announced an aggressive legislative package that would enable the Department to track various types of contractors by their safety records. Overall, it has been an enormous—but necessary—ongoing effort. However, improving construction site safety also requires the federal government to take an active and aggressive role.

I am proud of our partnership with OSHA, as much of our progress would not have been possible without their dedicated staff. Yet it is clear that if OSHA had more resources and staff, our achievements would be far greater. I urge Congress to follow New York City's lead in allocating increased funding to construction safety and provide additional resources to OSHA so they can deploy the construction safety inspectors they desperately need.

New York City has nearly 7,500 active, new building construction sites, plus nearly 8,000 major alterations and demolition sites under the Buildings Department's jurisdiction. OSHA has approximately 15 compliance officers for Manhattan, Brooklyn and Queens to enforce construction worker safety—including bridges, tunnels and other areas not under our Department's purview. Additionally, OSHA officers must also respond to incidents in parts of northern New Jersey and upstate New York. They simply cannot cover enough ground to show a meaningful enforcement presence.

While OSHA's inspectors do their best to respond to emergencies and complaints, they lack the critical enforcement tool I mentioned earlier—the Stop Work Order. Without authority to halt unsafe work when they find it, OSHA inspectors can only issue fines. While fines can be a disincentive, they do not carry the same immediacy as a Stop Work Order.

Recently, national attention has focused on crane safety after two crane collapses in New York City, as well as other crane problems across the country. This is a call to action for all of us. In New York, we have implemented new protocols and procedures, conducted inspection sweeps of cranes and are stepping up enforcement. But, we cannot do this alone.

The tower cranes that build our skyscrapers are like airplanes. They cross state lines, demand regular maintenance, need skilled operators, have important interchangeable parts—and bring catastrophic results when they fail. In New York City, we have been working closely over the past three weeks with industry, developers and labor to improve crane safety and to implement a set of safety proposals I announced yesterday. Of the new safety requirements we are pursuing, four necessitate strong Federal and OSHA oversight and involvement:

First, we support the proposed modernization to OSHA's crane rules. Countless American cities and states depend upon these antiquated regulations because they have no localized crane oversight of their own. Because tower cranes are transitory, it's imperative a better federal standard is established. The nation cannot wait another moment until the outdated OSHA tower crane regulations are revised to meet the demands of modern construction. Even though we are past the June 1 deadline in which no new Federal standards can be enacted, the Administration should make a special exception and pass these important crane standards now.

Second, the invaluable "black box" technology must be required in every tower crane across the country. This is the same technology used in airplane accident investigations.

Third, cranes have many interchangeable, structural components. These crucial parts must be clearly labeled to track them over their lifetimes.

Fourth, we are strengthening and expanding tracking and testing requirements for tower crane components. We are acting now, but this should fall under Federal requirements because these cranes follow construction sites across state lines.

We can do a lot in New York City—but the entire nation deserves better crane regulations. Only the federal government can guarantee that.

The time is now to make meaningful and lasting changes to minimize construction risk in New York City and across the country. Together, we can push all the responsible parties on the job site, from the workers to the managers and equipment users and most importantly, the contractors who supervise them, to make safety their top priority. It's going to take all of us to meet this challenge. Facilitating development does not require turning a blind eye to safety, and in New York City we won't.

Thank you.

Chairman MILLER. Thank you very much.

It is the intention of the Chair to take Mr. Kallmeyer's testimony now. We will then break for a vote, and we will be right back after the vote.

Mr. Kallmeyer, welcome.

**STATEMENT OF MIKE KALLMEYER, SENIOR VICE PRESIDENT,
CONSTRUCTION SERVICES, DENIER ELECTRIC COMPANY**

Mr. KALLMEYER. Chairman Miller, Ranking Member McKeon, distinguished members of the committee, I appreciate the opportunity to appear before you today.

My name is Mike Kallmeyer. I am the senior vice president of construction at Denier Electric in Columbus, Ohio. I have almost 30 years of experience in the electrical contracting field. I am pleased that the committee has decided to examine a subject that is of the utmost importance, workplace safety.

Project safety is a key component of any successful contractor's business model. A safe job site is essential for maintaining employee morale and performance, and thus increases the contractor's ability to run a profitable business. Our goal is always to prevent accidents rather than simply reacting to them after the fact. I am hopeful that today's hearing will serve to convince the committee that the best way to improve workplace safety is by continually working to prevent job site accidents.

Bad contractors who neglect safety rules and put their employees at risk should be punished to the fullest extent of the law. At the same time, it is important to recognize that the vast majority of employers care about their employees' safety and strive to run clean job sites that are safe and efficient. By working cooperatively to educate employers about the necessary workplace safety techniques and procedures, agencies such as the Occupational Safety and Health Administration can help continue the overall decrease in job site accidents that we have witnessed over the past several years.

At Denier Electric, workplace safety is part of our culture. It is part of our culture because it is the right thing to do for our employees and it is the right thing to do for our business. Make no mistake about it, being an electrician can be a hazardous way to earn a living. But I can tell you from personal experience that our industry's workplace safety practices and techniques are dramatically improved from 20 years ago and that they are continually evolving to meet the high expectations that we set for ourselves. That is why Denier encourages and practices workplace safety techniques through its own training and education programs, as well as the resources of our trade association, the Independent Electrical Contractors.

Safety on the job site must be part of everything we do as a business. It must be part of Denier Electric's culture if we want it to be effective. To put this in context, I believe it will be beneficial to give you real world examples of how Denier makes safety part of everything that our employees do. First, all of our employees receive training in what we call a safety indoctrination before they ever set foot on one of our job sites. Our electrical apprentices receive the OSHA 10-hour outreach training as part of their apprenticeship educational program. Additionally, we provide the OSHA 30-hour training for all Denier Electric field supervisors and annually update the 10-hour training for all employees. Along with that, each Denier Electric employee completes all the industry-recognized safety courses required for their field of employment. Denier

Electric also offers a Drug Free Workplace Program and offers rehabilitation assistance for anyone in need.

At the start of every construction project, we perform a hazard analysis of that particular job site, conducted by a Denier safety director in collaboration with field employees. He then conducts site-specific training for each construction site. And employees are provided with the necessary personal protective equipment for every job.

Along with that, we initiate a daily "frequent and regular" inspection of each construction site conducted by field management or employees to identify hazards and mitigate the risks.

Denier performs an incident investigation should an accident or "near miss" occur. These investigations are conducted by a team composed of management, employees, our safety director and, if necessary, an outside safety consultant. Senior management reviews all investigations to ensure that any corrective actions are completed.

Secondly, we utilize employee incentive programs to continually improve the safety of our company. I understand that some are critical of incentive programs, but I have seen firsthand that a properly run incentive program produces tangible results. Our incentive program rewards individuals with good safety records, individuals who exceed our own training requirements, and individuals who volunteer to serve on our safety committee. In order to ensure that this program is truly effective, Denier's incentive program and safety policies are reviewed annually by a team of employees, management and outside safety consultants.

A safe job site is a productive job site. And as you can see, at Denier, we take our safety programs very seriously and do everything we can to make our workplace safe. As I mentioned earlier—

Chairman MILLER. And with that, we are going ask you to wrap up because we have got to sprint to make a vote here.

Thank you. Your entire written statement will be put into the record.

Mr. KALLMEYER. Thank you.

If I may conclude with a point that I made at the beginning of the testimony, I believe that the most effective action for government is to aggressively promote its educational partnerships with the industry so that more employers have the resources to improve the workplace. By working together, industry and government can provide employers with the educational resources that they need to prevent accidents before they happen.

I would like to thank the committee for this opportunity, and I encourage you to work with your constituents, both employers and employees, to cooperatively improve job site safety.

Thank you.

[The statement of Mr. Kallmeyer follows:]

**Prepared Statement of Mike Kallmeyer, Senior Vice President for
Construction, Denier Electric**

Chairman Miller, Ranking Member McKeon, distinguished Members of the Committee, I appreciate the opportunity to appear before you today.

My name is Mike Kallmeyer, and I am the Senior VP for Construction at Denier Electric, in Columbus, Ohio. I have almost 30 years of experience in the electrical contracting field.

I am pleased that the Committee has decided to examine a subject that is of the utmost importance; workplace safety. Jobsite safety is one of the key components of any successful contractor's business model. A safe jobsite is essential for maintaining employee morale and performance, and thus increases the contractor's ability to run a profitable business.

Our goal is always to prevent accidents, rather than simply reacting to them after the fact. I am hopeful that today's hearing will serve to convince the Committee that the best way to improve workplace safety is by continually working to prevent jobsite accidents. Bad actors who neglect safety rules and put their employees at risk should be punished to the fullest extent of the law. At the same time, it is important to recognize that the vast majority of employers care about their employees' safety and strive to run clean jobsites that are safe and efficient. By working cooperatively to educate employers about the necessary workplace safety techniques and procedures, agencies such as the Occupational Safety and Health Administration (OSHA) can help continue the overall decrease in jobsite accidents that we have witnessed over the past several years.

At Denier Electric, workplace safety is part of our culture because it is the right thing to do for our employees and for our business. Make no mistake about it, being an electrician can be a hazardous way to earn a living. I can tell you, from personal experience, that our workplace safety practices and techniques are dramatically improved from 20 years ago, and that they are continually evolving to meet the high expectations that we set for ourselves.

That is why Denier encourages and practices workplace safety techniques through its own training and education programs, as well as the resources of our trade association, the Independent Electrical Contractors (IEC).

Safety on the jobsite must be part of everything we do as a business, it must be part of Denier Electric's culture, if we want to be effective. To put this in context, I believe it will be beneficial if I give you real world examples of how Denier makes safety part of everything that our employees do.

First, all of our employees receive training in what we call "safety indoctrination" before they ever set foot on one of our jobsites. Our electrical apprentices receive OSHA training as part of their educational program. Additionally, there is OSHA 30 hour training for all Denier Electric employees. Along with that, each Denier Electric employee completes all of the industry recognized safety courses required for their field of employment. Denier Electric also offers a Drug Free Workplace Program, and offers rehabilitation assistance for anyone in need.

On every one of our jobsites, each day begins with a "pre-shift huddle" where management and employees perform a hazard analysis of that particular jobsite. Denier's safety director also conducts site-specific training for each job, and Denier employees are provided with the necessary personal protective equipment for every job. Along with that, we initiate a daily "frequent regular inspection" of each jobsite, conducted by management and an employee representative.

Denier performs incident investigations, should an accident or a "near miss" occur. These investigations are conducted by a team composed of management, employees, and an outside safety consultant.

Secondly, we utilize employee incentive programs to continually improve the safety of our company. I understand that some are critical of incentive programs, but I have seen firsthand that a properly run incentive program produces tangible results.

Our incentive program rewards individuals with good safety records, individuals who exceed our own training requirements, and individuals who volunteer to serve on our safety committee. In order to ensure that this program is truly effective, Denier's incentive program is reviewed annually by a committee of employees, management, and an outside safety consultant.

A safe jobsite is a productive jobsite, and, as you can see, at Denier we take our safety programs very seriously and do everything we can to make our workplace safe.

As I mentioned earlier, Denier belongs to IEC, which is an organization that is very active in promoting and educating its members about jobsite safety. IEC provides its members and their employees with numerous tools and resources to improve their work sites.

A key to making progress with jobsite safety is continually educating contractors. Often times, employers may be unaware of the latest changes to safety regulations. OSHA's cooperative programs, with organizations such as IEC, serve as a valuable

conduit for ensuring that the busy contractor is kept up to speed on the latest regulations and workplace practices.

One of the keys to IEC's safety program is its Alliance program with OSHA. As part of IEC's agreement with OSHA, IEC commits to educating its members about OSHA regulations as well as relaying the best industry practices that are being promoted by OSHA.

At the same time, IEC can assist OSHA in ensuring that its guidance and regulations are effective and realistic. The Internet has allowed so much more information to be available to business owners, large and small. OSHA and IEC are using this resource to better educate contractors about the value of jobsite safety, as well as providing contractors with the resources to make safe jobsites a reality. IEC, as part of its Alliance program with OSHA, works with OSHA officials to produce informational pieces and articles—such as “e-Tools”—that are available through OSHA's web site, as well as IEC's.

An excellent example of this partnership is IEC's Jobsite Safety Handbook, which was produced in cooperation with OSHA. The idea behind this Handbook is to provide contractors with a pocket-sized guide for their supervisors and employees in order to provide on-site guidance for the often complex problems that electricians can face every day.

Since its production last year, IEC has distributed more than 25,000 copies of this guidebook to its contractor members, and more are being printed in order to meet the continued demand for this useful resource.

I am proud that Denier Electric is currently beginning the application process to participate in OSHA's Voluntary Protection Program (VPP). VPP is yet another example of OSHA working with industry to continually improve the workplace through cooperation and recognition of the best practices.

If I may conclude with a point that I made at the beginning of my testimony, I believe that the most effective action for government is to aggressively promote its educational partnerships with the industry so that more employers have the resources to improve their workplace.

By working together, industry and government can provide employers with the educational resources they need to prevent accidents before they happen.

Programs such as OSHA's alliances are effective and will continue to be so with the proper support from Congress.

I would like to again thank the Committee for this opportunity, and I encourage you to work with your constituents—both employers and employees—to cooperatively improve jobsite safety.

Chairman MILLER. Thank you. The committee will recess for a few minutes to run over, vote and come right back.

[Recess.]

Chairman MILLER. The committee will come back to order.

If we can get the people behind the witness table to take their seats please. These current votes are unexpected so we are going to see the best we can do here.

Mr. Ayers, welcome, and we look forward to your testimony. Okay. Let's go. Thank you.

STATEMENT OF MARK AYERS, PRESIDENT, BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO

Mr. AYERS. Thank you, Mr. Chairman. I want to thank you for providing me this opportunity to appear before you today and to discuss the very important issue of construction worker safety and health.

The building trades are comprised of 13 unions, representing 2.5 million craft professionals in the United States and Canada. We have a 100-year track record of improving working conditions for construction workers, both union and nonunion alike, because regardless of union affiliation every construction worker in America has the right to a safe and healthful workplace.

Unfortunately and all too often today, many construction workers will die, be injured, or become ill due to hazardous exposures on the job. After 20 years of steady improvement in construction safety and health, we suddenly find ourselves in the midst of a safety and health crisis. In the last 12 months, 17 construction worker deaths have occurred in the Las Vegas, Nevada area. These deaths and numerous others, along with the sudden increase of construction crane accidents that have occurred recently throughout the United States, have drawn attention once again to the dangerous nature of construction work.

Few people understand that on average four workers are killed every day on U.S. construction projects. Yes, you heard me correctly, four deaths every day. That equates to over 1,400 workers each year. Statistically, there is a much better chance of surviving a tour of duty in Iraq than there is in coming home from a construction project in our homeland. That is 10 times the number of firefighters who are killed each year, 10 times the number of law enforcement officers killed, more than 20 times the number of miners who are killed each year. And for every worker killed, several hundred workers are seriously injured.

Mr. Chairman, I submit that if, God forbid, 17 police officers had perished in the line of duty we would see the National Guard patrolling the streets of Las Vegas. And if two miners became trapped in an underground mine accident, television networks would interrupt their regular programming for live coverage of the rescue effort.

Nevertheless, it seems as though American construction workers are viewed as disposable commodities. It is an absolute outrage and it is something that I take very personally. Construction workers make up only 8 percent of the U.S. workforce, but we account for more than 22 percent of all work-related deaths. There is no question that the vast majority of the deaths, injuries and illnesses that occur in construction are preventable.

The building trades' commitment to job site safety led us to create in 1991 our own nonprofit institute, the Center For Construction Research and Training, to work in partnership with NIOSH and other organizations. Over the years, the center has made substantial progress in improving construction safety. Unfortunately, that progress is now being reversed.

The responsibility of job site safety rests with employers and with OSHA. Today, in our opinion, both are falling far short of meeting their responsibilities. Therefore, the building trades submit that five major actions are urgently needed.

One, we must have a dedicated Construction Occupational and Safety Health Administration, just like the Mine Safety and Health Administration.

Two, we need an OSHA temporary emergency standard requiring that all workers in the industry are trained and certified in accordance with the basic 10-hour OSHA safety and health training program.

Three, OSHA must promulgate a crane safety standard.

Four, OSHA should increase job site enforcement activities.

Five NIOSH funding should be increased for construction safety and health research.

Mr. Chairman, 2 weeks ago, over 6,000 construction workers walked off the Las Vegas City Center project after the sixth construction fatality occurred at the site. In negotiations between the general contractor and local construction unions, we have seen to it that all workers at City Center and the workers at an adjacent project are being trained in the basic OSHA 10-hour safety program. Our analysis found that roughly 5,000 workers are without the basic OSHA 10-hour training. Why? Because this basic training is voluntary, and until now the contractors on those jobs did not require it.

The building trades believes it is our moral obligation as worker representatives and industry leaders to make sure construction workers have safe and healthy workplaces. With the help of this committee and the Congress as a whole, we can achieve that objective.

Thank you, Mr. Chairman, for your interest in construction safety and health.

[The statement of Mr. Ayers follows:]

Prepared Statement of Mark H. Ayers, President, Building and Construction Trades Department, AFL-CIO

Mr. Chairman and distinguished members of this Committee, I want to thank you for providing me with the opportunity to appear before you today to address the very important issue of worker safety and health in the construction industry.

My name is Mark Ayers, and I am the president of the Building and Construction Trades Department of the AFL-CIO. I am a 36 year member of the IBEW, the International Brotherhood of Electrical Workers, and have served in various leadership positions prior to being elected as president of the Building Trades Department last year.

My organization, which I will refer to as "the Department", is composed of 13 international/national unions representing 2.5 million construction workers in the United States and Canada. The Department and its affiliated unions have a long history of improving working conditions for construction workers—both union and non-union alike. In fact, many of our organizations were founded over 100 years ago for that very purpose.

Introduction

I am here today to address the safety and health of all construction workers in this country: union and non-union alike. All of these workers enjoy the right, under federal and state law, to a safe and healthful workplace. Yet, many continue to die, incur injuries, and/or become ill due to exposure to dangerous substances on the job.

You have convened this hearing because of the critical point at which we find ourselves in today. We appreciate your concern. After 20 years of steady improvement in construction safety and health, we suddenly find ourselves in the midst of a safety and health crisis.

While the safety and health of construction workers has long been a priority of the Department, it's the alarming number of construction worker deaths that have occurred in Las Vegas—12 workers have died in just 16 months—that brings us here today. These deaths, along with the dramatic collapse of two tower cranes in New York City and other recent crane incidents in cities across the nation that have killed and injured construction workers, bystanders and even first responders, have drawn the media's attention to the dangerous nature of construction work.

Of course, this is not a new subject for those of us in the building trades. While we mourn the loss of every one of these workers, we know that by the end of this day, another four construction workers may lose their lives. And tomorrow, another two. And the next day, maybe six.

We know this because an average of four workers are killed every day on U.S. construction sites. Yes, in our nation we lose, on average, four construction workers a day, some 1,200 to 1,500 workers each year. That's 10 times the number of fire fighters who are killed each year, 10 times the number of law enforcement officers killed in the line of duty each year, and 20 times the number of miners who are killed each year. And, for every worker killed, several hundred workers are seriously injured. If the carnage that takes place in the construction industry happened in

any other industry there would be a national outcry. Yet, the only way we seem to be able to get attention to this huge problem is when a crisis hits, like the one we are faced with now. Think about it. It is an absolute outrage.

Construction worker deaths usually do not get front-page coverage. For the most part, they are usually single incidents—like an electrocution in New Jersey, a fall in Texas, a trench collapse in South Carolina, or a bulldozer rolling over on its operator in California. But let me tell you, they don't go unnoticed by other workers in the construction community. We know what it's like to lose a friend, and to see his or her family suffer.

In 2006, 1,239 construction workers were killed on the job, or died as a result of their injuries. Construction workers make up only 8 percent of the U.S. workforce, but account for more than 22 percent of all work-related deaths.

In 2006, according to BLS reports, 412,900 construction workers experienced injury or illness, of which 153,200 cases were serious enough to require days away from work. However, recent studies show the BLS survey may miss half to two-thirds of all injuries due to underreporting. Moreover, the misclassification of workers as independent contractors means many more injuries are unaccounted for, since self-employed workers aren't covered by OSHA or the BLS survey.

Less than 2.5 percent of the cases are from a work-related illness, but please don't let this low percentage fool you. Unfortunately, hundreds or even thousands of construction workers are being exposed at this very moment to an array of substances, such as asbestos, hexavalent chromium and silica, to name a few, that will cause disease years from now.

The sad fact is that we as an industry and as a nation really have no idea how many construction workers die each day from disease resulting from job site exposures. Moreover, family members, including children, have often been exposed to these harmful substances as well.

Those of us intimately involved in construction safety and health know that these deaths, injuries and illnesses are, by and large, all preventable. The outrageous number of fatalities in Las Vegas combined with crane incidents in New York and elsewhere has brought attention to the issue. Now that we have the attention of the media, the public, and, most importantly, the United States Congress, it's time that we talk about the construction industry as a whole and what needs to be done about it.

Describing the problems

Workers falling to their deaths in the construction industry are not unique to the Vegas strip. Falls are the leading cause of death in our industry. They make up about one-third of all construction deaths. Fatal falls from rooftops are the most common, followed by falls from scaffolding and ladders. Fatal falls from girders, attributed to some of the deaths in Las Vegas, make up only 8 percent of fall fatalities.

Workers who walk the iron have the highest rate of death among all other occupations in construction. Fortunately, due to a focused effort by all industry partners, death rates during steel erection have steadily declined over the years. That is a positive example of what can be done to improve safety and health conditions when there is a firm commitment to it.

It was the Department's commitment to improving safety and health conditions in the construction industry that almost 20 years ago led it to create our own non-profit institute-CPWR: The Center for Construction Research and Training. CPWR is nationally, and even internationally, recognized as a leading organization in the field on construction safety and health research and training. Through its partnerships with NIOSH, NIEHS, and DOE, CPWR has developed an impressive network of over 30 collaborating organizations, including universities, as part of its national construction safety and health research and training center. Since 1990, the CPWR has been a major participant in the NIOSH construction initiative.

CPWR currently has over 25 construction safety and health research projects underway, mostly involving development of specific interventions for hazards, such as falls and electrocutions. CPWR has developed and delivers an array of construction safety and health training courses to thousands of construction workers every year. CPWR also publishes the Construction Chart Book, now in its 4th edition, a copy of which will be submitted with my written statement. The Chart Book compiles everything there is to know about the U.S. construction industry and its workers based on the national data available to us. It goes into great depth about what we know about construction industry fatalities, injuries, illnesses, and hazards.

As president of the Department, I also serve as president of CPWR. I'm extremely proud of the accomplishments of CPWR over the years. It's one of the most successful public-private partnerships in the construction industry, or any industry for that

matter when it comes to occupational safety and health. The National Academy of Sciences reviewed the NIOSH construction program last year. While the Academy's final report has not yet been released, I'm confident that it will point to CPWR's national construction center as a key element of the NIOSH construction research program.

Through the work of CPWR and others we have characterized the problem and advanced the state of knowledge about construction safety and health significantly over the last two decades. In areas where we have had special emphasis efforts, such as preventing falls and electrocutions, we have seen significant progress over the past 20 years. Unfortunately, that progress is now beginning to be reversed.

Why is the progress being reversed? Research entities can produce useful information, and unions can push for, and even bargain for safety and health provisions as part of the collective bargaining, but both as a legal and practical matter, employers are ultimately responsible for the safety and health of employees, and Occupational Safety & Health Administration (OSHA) is responsible for enforcing construction safety and health laws. In our opinion, both are failing us at this time.

Recommendations

In our opinion, five major actions are urgently needed at this time:

1. We need an OSHA temporary emergency standard requiring that all workers in the industry are trained and certified in accordance with the basic 10-hour OSHA safety and health training program.
2. We need OSHA to promulgate a crane safety standard.
3. OSHA needs to increase enforcement activities.
4. We need a dedicated Construction Occupational Safety and Health Administration, just like we have a dedicated Mine Safety and Health Administration.
5. We need to increase NIOSH's funding for construction safety and health research consistent with the recommendations of the soon-to-be-released National Academies Review.

Two weeks ago over 6,000 construction workers walked off the Las Vegas City Center project after the sixth construction fatality. In negotiations between the general contractor and local construction unions, it was agreed that CPWR would put in place a system to train all site workers at City Center, and the adjacent Cosmopolitan project, in the OSHA 10-hour training program. Our estimate is that approximately two-thirds of the workers on both sites, or roughly 5,000 workers, have not had the basic OSHA 10-hour hazard awareness training. Why? The basic training is voluntary and until now, the contractors did not require it on the site.

This is not unique to these two projects in Vegas, and it brings me to my first point about what needs to be done as a general rule in the construction industry. OSHA needs to promulgate a construction training standard, making it mandatory for every construction worker to have, at a minimum, the basic 10-hour safety and health hazardous awareness training. We've seen several states enact legislation requiring this training, and it's time a rule is enacted at the national level. Surely, requiring that workers engaged in this very hazardous industry have basic safety and health training is not asking for too much.

We also need to take serious steps to change the safety and health culture on construction sites, so everyone participating in the construction process—from the owner to the general contractor and subcontractors to the workers—understands the premium placed on working safely. As a first step in achieving this objective, we call on OSHA to require every construction project to have a written safety program and plan that clearly spells out the safety and health requirements of the site, the respective roles of the OWNER, contractors, subcontractors and employees, and the systems for identifying and minimizing hazards.

Also on the issue of standards, in 2004, a group of labor, industry, and government safety and health professionals reached a consensus on a standard for crane and derrick safety in the construction industry. After four years, OSHA has indicated its plans to publish the standard for public comment in August 2008. OSHA must live up to this commitment, promulgate a final rule, and enforce the new standard.

OSHA enforcement is particularly problematic in construction, due to the transient nature of our industry. About 80% of U.S. construction industry employers have 10 employees or fewer, and over 2 million workers in the U.S. construction industry are classified, or should I say misclassified, as self-employed or independent contractors. OSHA needs to be more innovative in its targeted enforcement activities; compliance operations need to be focused on those issues and violations that are known killers in the construction industry; OSHA needs to redirect the resources allocated to compliance assistance and alliances to enforcement; and OSHA penalties for serious and willful violations need to be enhanced so that there are

serious consequences for serious violations of the law, particularly in cases of worker fatalities.

Although there is value in forming partnerships to encourage workplace safety, in my estimation the extensive resources OSHA has devoted to alliances simply means the agency is spending its money on contractors that are already performing at a relatively high level, rather than reaching those medium to small employers that are willingly or unwillingly putting their workers in harms way.

According to 2006 data there were a total of 876,229 construction establishments in the U.S. In 2007 OSHA data indicates there were 49,666 construction inspections (combining Federal OSHA and State Plans), meaning that it would take OSHA an average of 17.6 years to inspect each construction establishment once. I don't know of many construction projects that last 17.6 years, and I venture to guess that there are thousands of employers in our industry that will never see an OSHA compliance officer.

One has to ask what good are construction industry standards if they are not enforced. Funding is certainly a critical issue, and the Department has long been a proponent of OSHA's budget. However, I am of the mind that, no matter how much funding is appropriated, our current system may simply not work for this industry. I'm sure there are members of this Committee more familiar with the legislative history than I am, but I think we should explore the need for a dedicated Construction Occupational Safety and Health Administration, just like we have a dedicated Mine Safety and Health Administration. In the short term, we need a stronger Construction Directorate Office within OSHA, one that is willing to work with all industry stakeholders, and not just with a selected few.

From before the OSHAct, it has been recognized that the construction industry is different from other industries in many critical aspects. It is very large, and it is very transient and mobile. The worksites are temporary, with many different employers and trades working on them simultaneously. The recognition of the need for special OSHA approaches for this industry also goes back a long way. The Secretary of Labor's Advisory Committee on Construction Safety and Health existed before the OSHAct and was continued after OSHA to make sure that OSHA's rules were responsive to the needs of the industry. In 1994, OSHA established a dedicated Directorate of Construction to make its operations more attuned to the needs of the industry. Both of these have been valuable resources, but they are not enough.

The Building Trades Department and CPWR are committed to improving safety and health conditions for all construction workers. We will continue to develop joint safety and health initiatives with our employers, associations, and owners. We have enjoyed a longstanding partnership with NIOSH, and we have made tremendous strides. Congress needs to increase NIOSH funding for construction safety and health research consistent with the recommendations of the soon-to-be-released National Academies Review.

Twenty years ago there was no research being performed on construction safety and health. Congress corrected that and began to dedicate funding for construction safety and health research at the National Institute for Occupational Safety and Health. By 1995 the budget had increased to \$12.1 million, which has remained unchanged in 13 years thereafter. As a consequence, the amount of funding available after adjusting of inflation has significantly eroded the funding. It is today equal to \$1 per construction industry worker. That does not say much for the priority that Congress places on construction safety and health.

While it's not our responsibility under the law, it's our obligation as trade unionists and industry leaders to make sure construction workers' rights to a safe and healthy workplace are honored. We can do better. We have to do better.

Again, I greatly appreciate the opportunity to appear before you today.

Thank you, and thank you for your interest in construction safety and health.

Chairman MILLER. Thank you very much, and again thank all of you for your testimony.

Mr. Foulke, it has been raised several times already this morning, how come it is taking so long to do the crane safety standard? My understanding was the negotiated rulemaking was completed in 2004.

Mr. FOULKE. That is correct. The negotiated rulemaking was completed in 2004, and we have—what the negotiated rulemaking completed was the regulatory text of the document. OSHA has—and that reg? text is approximately 119 pages long currently. As

a result, we, OSHA, then had to then draft the preamble. The preamble in this document is over 1,000 pages long. Once that was completed, we had to go through the regulatory flexibility analysis. We had the SBREFA review, which we had for small business review, and then we had the Paperwork Reduction Act. So we had to do all those things during that time period. Also, we had to because of the—the standard had to be then reviewed—the text of the standard had to be reviewed to ensure that it was not in conflict—

Chairman MILLER. How does that compare to other, the time frame after other negotiated rulemakings?

Mr. FOULKE. I don't—

Chairman MILLER. Does it take 4 years for every other, after you do negotiated rulemaking, does it then take 4 years to get them in place? Is that standard?

Mr. FOULKE. I'm not positive, but I believe it is probably—unfortunately—

Chairman MILLER. Do you know?

Mr. FOULKE. I don't know right offhand but we can check that out for you and get an answer for you.

Chairman MILLER. Okay, in your statement, you talk, you stated in 2007 for fall protection violations we issued 24,000 citations for a total of \$33 million in penalties. What does that tell us?

Mr. FOULKE. What that tells us is that OSHA's enforcement program regarding construction is working.

Chairman MILLER. That 24,000 citations were issued and, given your limited ability to inspect sites, this is a good trend?

Mr. FOULKE. No. It shows that our targeting inspection program for identifying where the high hazard construction sites are, where there may be problems, is working and that we're getting to those sites and we are issuing citations.

Chairman MILLER. So that 24,000 is the high targeted sites?

Mr. FOULKE. I think we do have, we have special emphasis programs throughout in construction.

Chairman MILLER. I understand that. I'm trying to determine what does that figure tell me?

Mr. FOULKE. I think it focuses on obviously we are inspecting those where the fatalities occur, because those are automatic inspections. We are obviously—we have our—

Chairman MILLER. There were 400 fatalities due to falls. This is 24,000. I am just trying to determine—you suggested this is a barometer of being aggressive. I don't know what 24,000 sites tell me. And if I divide that into 33 million it tells me about \$1,300.

Mr. FOULKE. All I can say is I think it demonstrates we have an effective safety enforcement program that is focused on getting to the sites that have the problems and we are finding the problems and correcting them, or having them abated.

Chairman MILLER. I am going to ask you to provide supporting evidence of that because I don't know that. I understand that is what you are saying, but I don't know that that is what it tells me. I don't know if 24,000 is small because you couldn't get to enough sites. I don't know if it is abusive because you got to sites you shouldn't get to. I don't know what it tells me. It is a figure and a fine. I don't know if \$1,300 per incident is sufficient or not. It

doesn't sound like it. If these are serious, if these warrant violations and serious infractions, if that is what the violation brought about, I just—I can't decipher that information is what I am saying.

Mr. FOULKE. Perhaps we could break it down and provide the committee some additional information how that breaks down. But like I say, I really believe what that tells us is that our enforcement program, our targeting system, our national, local and regional emphasis programs are focused on the sites we need to be getting at and we are getting to where we need to get.

Chairman MILLER. Mr. Cole, who is sitting next to you, his brother-in-law was killed and there was no fine. There was a preliminary fine, as I understand it, and then there was a decision to remove that fine later on.

Mr. FOULKE. That is my understanding based on his testimony.

Chairman MILLER. So you went from a preliminary fine to—of the employers, there was some investigation, preliminary citation fine was issued, and then later it was determined it was entirely the fault of the worker and no fine was issued.

Mr. FOULKE. Mr. Chairman, that came under Nevada OSHA. And the question then becomes—I don't know exactly what was all in part of that. There is the employee misconduct defense. That is a defense that has been recognized by the review commission, the Federal courts and State courts. I don't know if that played in it because once again we don't have jurisdiction over Nevada OSHA. So I don't know what was involved in the negotiations. If they determined that they didn't have the evidence to support the violations or not, I don't know.

Chairman MILLER. Let me just follow up on that line with the indulgence of my colleagues here. Nevada OSHA is one of the States like California. Nevada OSHA has been certified by the Federal Government. They run their health and safety as we do in California.

Mr. FOULKE. That is correct.

Chairman MILLER. In the case that I cited in my testimony and is laid out more exhaustively in the Las Vegas Sun, time and again there are assessments and fines filed, and then time and again, after essentially what becomes a private meeting between the employer and Nevada OSHA, those fines are substantially reduced or waived together.

You have no authority to look at that enforcement to see whether or not that is sufficient or not, absent questioning the whole program, is that correct? You don't get to intervene under current law as to whether enforcement or training or these various components of that are adequate?

OSHA might have certified Nevada 13 years ago to do this. I don't know when they did. And at that point it is their ball game, as I understand it.

Mr. FOULKE. I was looking here. They had relinquished full authority back in April 2000 from Nevada. But to answer your question, just like in California too, once we provide, give full authority to the State plan, then they have full jurisdiction over their safety and health program. We can, though, however, issue—or go in as part of—what is it called—HAFVA, which is a complaint that al-

lows—Federal OSHA is a complaint about a State planned State on a particular item that we can go in and that is given to usually to the regional administrator and they do an investigation on that particular State plan. We also do studies and we actually are doing a current study. We had a complaint regarding the settlement in a New Orleans hotel site settlement so we are looking at those too. So we can go in, but it is limited.

Chairman MILLER. I raise that point because in your testimony and you have said before in your appearances before this committee that these fines are an important part of your operation, and yet we see in this case Nevada OSHA is waiving what you considered an important enforcement tool at the national level. I am not holding you responsible for what they are doing. I am just saying somehow there is a different view of the universe here in terms of the role that these fines play in helping to diminish the accident rate and the ability to enforce the law.

Mr. FOULKE. Well, like I said, once again because it was Nevada OSHA I am not sure what was all involved. But you need to understand as part of the settlement process that are utilized by both the Federal program and all the State programs is that when an employer has been issued citations and once those citations have been contested, there is no requirement under the act to abate those sites, those hazards until there is a final order of either the review commission or the State review commission, which is however it works out. And normally during the settlement process what you have is there is sometimes reductions in the penalty amounts or even the classification of the penalty, but in turn, and part of the reason is to get immediate abatement of the hazards so that the employees are protected from the safety and health hazard that has been identified, but secondly normally, I know from the Federal OSHA standpoint and I know from my past practices as an attorney representing employers in this area, there was always a requirement when there was a penalty reduction that something else would be given, done by the employer that was not required under either the standard or the act.

So in effect you are getting some things for the penalty reduction, but with respect to this particular item I don't have the information because, like I say, it was handled by Nevada OSHA.

Chairman MILLER. I have run out of time. But I would just notice that in the Las Vegas Sun story again, Perini Construction Company is involved in four of these cases and yet fines continued to be reduced. There is something wrong with that enforcement plan, but we will come back to that.

Mr. McKEON.

The gentleman is recognized for 5 minutes plus.

Mr. McKeon. Thank you, Mr. Chairman. Secretary Foulke, in Mr. Cole's testimony he criticized OSHA for issuing a compliance directive in conflict with the underlying steel erection regulations. Can you explain the controversy and why OSHA has taken the position that it has?

Mr. FOULKE. Yes, sir. The steel erection standard was once again a negotiated type of rulemaking where we had industry and the unions and the government involved in that, in preparing the materials. One of the biggest issues—and if you—actually I have the

preamble here. If you look at the preamble, the most contentious issue in this whole development of the steel erection standard was fall protection. There was a desire to have 100 percent fall protection included in the final rule. When the final rule, there was a draft final rule proposed that had 100 percent fall protection in there. And it was distributed to all the stakeholders who were involved in the—excuse me, in the standard, in the rulemaking. At that point there was a request I believe from the iron workers, but there may be other groups that were involved, to include exceptions that were previously included in the proposal, the proposed regulation, the post-steel erection regulation. And the final rule was determined to have the two exceptions, and two exceptions to 100 percent fall protection was for the—was dealing with the connectors and the deckers from 15 feet to 30 feet and also dealt with the shear stud issue. Those were the two things which said that you do not have to have fall protection, you do not have to have 100 percent fall protection; in other words, you have to be tied off. You can have either a decking or netting below it at either two stories or 30 feet.

Just as an example, that is 30 feet. If you fall from that, if I fell backwards off of that and landed on this floor, the likelihood of me surviving is low because if you look at—the data shows that most of, over 50 percent of the fatalities are less than, from falls of less than 30 feet. So we had that problem. And so the question was—and it was presented to my predecessor, Mr. Henshaw—is if an employer instead of requiring to have the decking at 30 feet or two stories or 30 feet, whichever is less, and with respect to shear studs, if they didn't have the shear studs, instead of having shear studs installed at the site as opposed to shop installed studs, that if they were using 100 percent fall protection; in other words, if they were tied off at all times when they are on there, would that be a violation of the standard? And the determination by Mr. Secretary Henshaw or Assistant Secretary Henshaw was that if they were using 100 percent fall protection, that they were tied off completely, that he took the position that that was as effective safety protection, actually it was more safety protection because—than what was provided in the standard because if a person falls from there, from a lanyard he will fall five to six feet instead of falling 30 feet. And that is basically how it came out. But it was a contentious—if you read the standard—excuse me, read the preamble of the standard it says this is one of the most contentious issues of the standard.

Mr McKeon. So in the case that we are talking about, of Rusty, they didn't have the 30-foot or two-story protection because he was supposed to be tied off then? Was he supposed to be doing one or the other on this job?

Mr. FOULKE. Which one.

Mr. McKEON. On the job that we are talking about.

Mr. FOULKE. The fall protection, I am not sure if—I am assuming he was above—was at between 30 and—15 and 30 feet because if he was above 30 feet then 100 percent fall protection would be required under the standard.

Mr McKeon. So what is 100 percent protection?

Mr. FOULKE. One hundred percent protection is that they are in a harness, with a lanyard and attached to an anchoring point or a safety line.

Mr. McKEON. So if you are working above 30 feet, everybody is supposed to have that so that—

Mr. FOULKE. That is right. It is interesting if you read the standard. This is—the standard that was written is kind of unusual because the standard actually requires the employer to provide fall protection. There is a separate section other than the decking and netting section that requires fall protection, 1926760? requires that the employer provide all the fall protection, the belts, the harnesses, whatever the fall protection, the lanyards, the lifelines, and the employees are supposed to wear the equipment. But the standard does not require them to hook off. And it is spelled in the preamble. It is just—it was an unusual standard when it was promulgated.

Mr. McKeon. Who sets that standard?

Mr. FOULKE. OSHA proposed the standard and—but we worked with the committee to get to provide—

Mr. McKeon. And you signed off on something that didn't require—

Mr. FOULKE. No, no, this was—

Mr. McKeon. I don't mean you personally.

Mr. FOULKE. It was promulgated in the Clinton administration.

Mr. McKEON. I wasn't meaning you personally. OSHA signed off on an agreement that indicates 100 percent protection but if you don't clip off, you don't have the 100 percent protection.

Mr. FOULKE. No, it is only between the 15 and the 30 feet that you actually have to provide—between—anything over 30 feet or two stories they have to be hooked on by standard. Between 15 and 30, there is an exception.

Mr. McKeon. Then how could he die if he was doing this?

Mr. FOULKE. If he was connected to the lifeline, if he had, if he was following the rules—either one way or the other, either you had decking or netting—

Mr. McKEON. But he was above 30 feet. He was at 60 feet.

Mr. FOULKE. No—well, he may have been. I don't know but—

Mr. McKEON. Mr. Cole stated that he fell over 59 feet.

Mr. FOULKE. Oh, this was—you are talking about—that one I am not sure. I don't know the facts of that case, to tell you the truth. I don't know if there was—there was something about—I don't know if he fell between a hole in the flooring or not. That is what I had read. I think there was something in the newspaper said there was a hole in the flooring.

Chairman MILLER. Do you want to respond quickly?

Mr. COLE. I will respond, when he is done.

Chairman MILLER. He's done. That is one of the wonderful things about being chair of a committee.

Mr. COLE. Two things I want to respond on is that sub part (r) clearly states that there will be one floor or 30 feet. It also states tie off. But that rule is being misinterpreted because the iron workers worked through the nineties to get this thing on. And it wasn't just to protect the iron worker from a fall. It is to protect the people in the other trades that work underneath the 30-foot. If an iron

worker or anybody or the wind would drop one item through that hole to a person that is walking on a floor that is being finished, studs are going down, and electrical is going in the floors, that can kill somebody with a 60-foot drop and that is why they want 30-foot.

It also makes it so other crafts can work underneath the iron workers as they go up the building. So the 30-foot hole and the tie off are two separate issues. And we need to separate them for a good accountability of what is right and what is wrong.

Chairman MILLER. Thank you, Mr. Kildee.

Mr. KILDEE. Thank you, Mr. Chairman. Mr. Foulke, the presence of cranes in any city is an indicator of generally economic growth. That economic growth ordinarily would indicate that we can afford the best safety enforcement possible. What governmental or fiscal factors interfere with us in providing that safety enforcement? Is your budget inadequate or is your enforcement authority inadequate?

Mr. FOULKE. Well, Congressman, I would just state this, if you look at the fatality rates in both general industry and construction, they have to be continually going down. So I would say that what we are doing, how we are targeting that in our enforcement efforts, our targeting enforcement, but also our outreach program. I mentioned about the 1.6 million employees that have been trained on the OSHA 10-hour course as a result of our outreach to that. So I can't say that—well I guess I can say I think our efforts are working. We have our effective enforcement, we are targeting them, we are doing the training programs. We are doing partnerships and our partnership programs have been very effective, especially in construction because that is kind of where we focused our emphasis on the partnerships because most of the—over 50 percent of the partnerships are construction. And the idea there is to help develop training programs, best practices, model policies, whatever it takes, we are working together and I think it was mentioned by one of the other speakers in their testimony, that that is part of what we have to do. We have to train the employees and we are doing that I think pretty effectively; 1.6 million since 2004 to me is as effective as a lot of people being trained on the OSHA 10-hour course and 30-hour course.

Mr. KILDEE. How does our construction death record compare with European countries or Canada?

Mr. FOULKE. I don't know the answer to that, to tell you the truth. But I think we can get that information. I don't know how they keep records. All I can tell you—what I can tell you though is that there has been a decrease in workers comp claims both in the United States, in Canada and the European nations. So I think there has been a general trend. I think the injury illness and fatality rates have been pretty much trending the same way in those countries.

Mr. KILDEE. Well, the Center for Construction Research and Training indicates that Finland, Norway, Germany, Australia, Canada, Switzerland, Sweden have less than half the fatalities in construction than does the United States. Now it would seem to me that it is not meant to be personal but you should know. You are the guy in charge. You should know how we compare. I mean, I

look at many things to see how we compare. It would seem to me that of all people in the country you should know how we at least compared to—Canada is 60 miles from my district. And Canada's rate of death is about half in the construction industry. What are they doing right that we aren't doing?

Mr. FOULKE. Well, Congressman, I would say that once again our injury illness and fatality rates have continued to go down both in general industry and construction. So we are—I think we are making progress. Why Finland or even Canada or Australia, their rates may be low, and I don't know, not having seen the data, if there is the type of construction that they do or the amount of construction that they do. In Nevada we are talking about one project that has 7,000 employees on the site, just one project.

Mr. KILDEE. Canada is very similar to the United States. They are part of the NAFTA agreement. I can go either north, south, or east to get to Canada, within a matter of 1 hour. So I see that regularly and you look across the Detroit River and you see the cranes there in Windsor and they are doing a lot of construction there and yet half, that is a pretty good record, half of what we have. Why are we not emulating Canada?

Mr. FOULKE. Like I say, I don't have—I haven't seen the data and so I would have to look at the data before I can give you an answer, and I would be happy to do that.

Mr. KILDEE. I suggest you look at the data and visit Canada. It is a nice country. I see it regularly, and I see cranes there all the time. Just go to the Detroit River there and look on both sides and Canada is doing a lot of construction, yet their death rate is half.

I yield back.

Chairman MILLER. Thank you. I want to recognize Mr. Kline. Before I do, I just want to say the committee has been joined by Congresswoman Shelley Berkley, who represents Las Vegas.

Mr. KLINE.

Mr. KLINE. Thank you, Mr. Chairman. I want to echo Mr. Kildee's notion that we should all visit as many countries as possible. I am not sure if he was limiting it to Canada. But it is always a good idea to see how the rest of the world works.

Mr. Kallmeyer, I must admit I am looking at your lapel and what that pin might be. I was going to speculate it looked like flags. Could you tell us what that is?

Mr. KALLMEYER. Yes, sir. It is Marine Corps and—

Mr. KLINE. Outstanding. Thank you very much. I thought it might be. It just looked a lot like mine.

Mr. KALLMEYER. Semper fi, sir.

Mr. KLINE. Semper fi, sir, and welcome. It is nice to have you on the committee. Mr. Kallmeyer, continuing with you, last week, I think it was last week, in this committee we heard testimony that employers were underreporting injuries and illnesses. And we also heard from some that safety incentive programs may encourage workers not to report injuries. Interesting concept. Your testimony outlines the Denier incentive program as successful and describes how it helps to ensure a culture of safety. Could you tell us how and elaborate on that a little bit?

Mr. KALLMEYER. Yes, sir. At Denier Electric Company our incentive programs are heavily based on collaboration; that is, coopera-

tion between employees, between management, field management, senior management, and outside consultants. Our incentive plans are based upon the end result, which is a safer job site. The individuals wind up with a reward for their contribution to that end result. If the overall safety results were not improved, they were not better than industry averages, there would not be any incentives there.

Mr. KLINE. So there is no incentive for an individual to not report in the way you have it put together?

Mr. KALLMEYER. Absolutely. If there is an unsafe situation, if there are employees who are not participating in education, who are not getting certifications for their lift operations or their trench ensuring operations or their lockout-tagout certifications to prevent electrocution, it is recorded. And if they aren't participating, they are not included in those incentives.

Mr. KLINE. Thank you. Thank you very much, Mr. Chairman. I yield back.

Chairman MILLER. Thank you. The gentlewoman from New York, Ms. McCarthy, is recognized for 5 minutes.

Mrs. MCCARTHY. Thank you, Mr. Chairman, and I appreciate having this hearing. Mr. Foulke, what are the things—and I don't know if anybody had heard this question. I didn't hear it—well, actually I did hear it a little bit. I know every time we ask if you had enough money to be able to run the program as it should be, we always have well, no, we do all right, and yet we see that there is such a shortage of OSHA inspectors going around. When you look at New York they have done a terrific job on having certainly a very, very large amount, probably 20 times more than what you have in the city alone, but one of the other things that I wanted to ask you also when you were talking about the safety and how on training the employees, is that voluntarily or is that mandatory?

Mr. FOULKE. Madam, it depends on the particular State. There are some standards that have specific requirements for training. And it depends on which standard you will be looking at. So as a general rule training is not—it depends on the standard, I guess I have to say.

Mrs. MCCARTHY. So some States make it mandatory, some States don't make it mandatory; it is voluntary?

Mr. FOULKE. If it is in the standard, if it is a State plan then they have to be as effective—it would require them to have at least the same level of coverage that the Federal standard has.

Mrs. MCCARTHY. One of the problems that I see in looking at the testimony, Mr. Ayers, they do contracting where it becomes mandatory, if I understand from your written testimony, on training has to be mandatory. That is part of the contracts through the unions.

Mr. AYERS. That is correct in some cases. But to answer your specific question, training is voluntary. But the difference is we need our employers to demand that anyone reports to a construction site has at minimum a 10-hour OSHA card.

Mr. MCCARTHY. Exactly. That is what I am trying to get at. Why can't we make it mandatory that everybody goes through 10 hours of training through OSHA?

Mr. FOULKE. Well, I mean there is a mandatory training in construction, but it is not the 10 or 30-hour course. I mean we could—

obviously there could be a—a standard could be promulgated on training to require the 10 or 30-hour course. But once again—

Mrs. MCCARTHY. Do you have enough people to actually do it? Just say it was mandatory or even voluntarily. Do you have enough inspectors to be able to even carry that through?

Mr. FOULKE. Well, even if the construction—if we had the mandatory 10 or 30-hour course, we would handle that through our OSHA Training Institute. We also have ed centers with universities and community colleges around the country who are doing that already. We trained—from 2004 to the present we have trained 1.6 million employees on the OSHA 10 and 30-hour courses. So we are doing the training. We would have the ability to do it through our ed centers, I believe.

Mrs. MCCARTHY. I am just thinking about a lot of the—you know, you had mentioned in your testimony that we are seeing a lot more Hispanic workers on the job and, yes, you have done a program as far as putting things up as far as safety issues in that particular language. But again with those that are not union contracted, have they had even the correct training to be doing the job that they are doing?

Mr. FOULKE. Well, once again I would say that we do have mandatory training in construction. It is not the 10 or 30-hour course, but we do have—and of that 1.6 million that have been trained, I don't know—we don't have a breakdown—or I don't have a breakdown as to whether that is all union or nonunion or who it is.

Mrs. MCCARTHY. All right. Maybe you have another number for me. How many construction workers do we have total in this country? Ballpark figure.

Mr. FOULKE. I am trying to remember. I have seen the figure but—

Mrs. MCCARTHY. Mr. Ayers?

Mr. AYERS. We estimate 12 million.

Mrs. MCCARTHY. 12 million. So we have trained under your estimate 1 point?—the whole idea about OSHA, isn't it supposed to be prevention?

Mr. FOULKE. Yes, ma'am.

Mrs. MCCARTHY. Well, we haven't even touched the surface then.

Mr. FOULKE. Once again it is the employers' responsibility to make sure they do receive the basic training on construction.

Mrs. MCCARTHY. But we are going around in circles here. Basically you are saying the employer. And we know that a lot of employers are doing their job, but it seems to me that an awful lot of employers are not doing the job because we have too many injuries and we have too many deaths on a yearly basis, even though you are saying the numbers are coming down. But maybe it is because there are some training programs. But isn't it up to the Federal Government to have a standard that all construction workers should go under a safety training program?

Mr. FOULKE. Well, once again the 1.6 million are the ones that we know that have taken the 10 and 30-hour OSHA training courses. We don't know what other safety and health training other employees have received. We don't keep those numbers.

Mrs. MCCARTHY. Do you think it would be a good idea if you had those numbers? Just so we would have a truer picture?

Mr. FOULKE. It is difficult. The reason we have those numbers is because they are being trained through our ed centers around the country. There are other consultants, safety and health consultants, there are thousands of safety and health consultants around the country that do training, and the employers may be providing training. And they may not be doing the 10 or 30-hour course, yet they are doing a full program of safety and health training for their employers and we are not capturing that.

Mrs. MCCARTHY. What would you consider—if the employer is doing a safety program and it is not the 10 or 30-hour program, what would you consider the bare minimum that would actually make our workers safer.

Mr. FOULKE. I think under the standard they are supposed to be advised and trained on the hazards associated with their work sites, what they would normally be exposed to and be able to train to avoid them and also training on personal protection.

Mrs. MCCARTHY. Is it a 1-hour course? Is it a 2-hour course? Is that a talk before they go on the job?

Mr. FOULKE. A 10-hour course is much more comprehensive than that.

Mrs. MCCARTHY. But it is not mandatory?

Chairman MILLER. The gentlewoman's time has expired. You can answer the question.

Mr. FOULKE. We don't have the data. They may be being fully trained through the employers' private consultants and not taking the 10 or 30-hour courses. And I think it is up to the employer maybe to design the course to be able to train the employees on the hazards that they are going to be associated with in their particular type of construction.

Mrs. MCCARTHY. I will yield back but it might be curious to find out if Canada actually makes it mandatory for all safety training.

Chairman MILLER. I thought we blamed everything on the Canadians. No.

Mr. BISHOP OF NEW YORK.

Mr. BISHOP OF NEW YORK. Thank you, Mr. Chairman. Thank you for holding this hearing, and I thank the witnesses for their testimony.

Secretary Foulke, it is my understanding that a process took place from July of '03 through July of '04 with all of the stakeholders associated with proposing new regulations for crane safety. It is my understanding that that process resulted in consensus among all of the stakeholders with respect to draft regulations. Four years later OSHA has still not proposed a final rule. I can understand, I think, that lapse of time when the proposed rule or the draft regulations are contentious. But my understanding is we have agreement with all of the stakeholders and still we have 4 years elapsed with no proposed rule.

Can you comment on that and help us understand why it would take—when all of the stakeholders have agreed why would it take 4 years to issue a proposed rule?

Mr. FOULKE. Well, I would first mention the fact that the first negotiated rulemaking regarding steel erection took about 9 years. They started in 1992 and finished in 2001.

Mr. BISHOP OF NEW YORK. Was that contentious or was that also a consensus building process such as the crane regulation process?

Mr. FOULKE. The 100 percent fall protection issue was contentious on that. But at the same time, there was no requirement for—

Mr. BISHOP OF NEW YORK. If I could get you to focus on the crane thing. Again, why it is it that it would take 4 years?

Mr. FOULKE. Okay. The reg text is all that the negotiated rule-making team worked, the CDAC team developed. So we had the regulatory text. That is 119 pages. From there we had to develop the preamble which basically the preamble to any standard basically spells out in detail what each provision is determined to give kind of instructions to employers and employees and all business organizations and the unions as to what, why that particular item was put on that particular standard.

The preamble to the cranes and derrick standard is over 1,000 pages long. So that all had to be drafted by the agency. That was not drafted by the CDAC committee. Then we went through, and we are dealing with a lot of different things. We are talking about this is a very comprehensive standard. It is dealing with ground conditions, assembly, disassembly, power lines, electrocution issues, operator certification, safety devices, signaling and inspection. So we have all these things we had to work on and then we had to look at each one of both the construction standards that were already in place to determine if this somehow was a conflict. Then we had to go through the regulatory flexibility analysis. We had to go through the small business review process, small business review, then we had the paperwork review. Then of course you have to have the attorneys look it, and that is what is taking so long. This is a major standard.

Mr. BISHOP OF NEW YORK. My understanding is that the White House has decreed there are to be no final rules proposed for OSHA standards subsequent to June 1. Will you request a waiver of that standard so as to expedite the crane standard?

Mr. FOULKE. What we do is we have the process—you have to look at the process—

Mr. BISHOP OF NEW YORK. Yes or no? Will you?

Mr. FOULKE. I have to explain the process here. It is right now before OMB. Once they review, provide that review then we have to put the proposed rule in the Federal Register and provide comment period, which will be 60 days. Then under the act, we are—the OSHA act provides that any person can request a hearing on that standard. There more than likely will be a hearing on this standard.

Mr. BISHOP OF NEW YORK. I think what I'm hearing is a no, that you will not—

Mr. FOULKE. We will have the proposed rule out some time probably by September. And then the other process goes through. So unfortunately the time periods that are allowed under the law are going to carry it into 2009.

Mr. BISHOP OF NEW YORK. I only have time for one more question.

Mr. LiMandri, if the draft regulations agreed to by the stakeholders with respect to crane safety had the force of law, in your

opinion, would those regulations have prevented the two accidents that took place in New York City?

Mr. LIMANDRI. The two different accidents that occurred in New York City are both under investigation, and I don't want to compromise that investigation. I will tell you that we are here today because these CDAC regulations will standardize across the Nation—cranes are transitory. They go across State lines. If there are not Federal regulations that make the operators, the people who maintain those cranes, and how those cranes are worked on when they go in and out of a jurisdiction, and there is no standard baseline, I do think that it will have a large effect across the Nation on the standard. So, we are here today to support that. There are some very specific pieces in this that would raise the level of standard. That can make a difference.

Mr. BISHOP OF NEW YORK. Thank you. I yield back. Thank you, Mr. Chairman.

Chairman MILLER. Thank you.

Ms. WOOLSEY.

Ms. WOOLSEY. Thank you, Mr. Chairman. Actually if I was Mr. Cole and I was listening on the responses as to why everything took so long, blah-blah-blah-blah, I would be asking the question, why wasn't that all in place before my brother died? Four years later, I mean, we take too long. So, Mr. Ayers, you said it, I mean you actually said in so many words that accidents have become big news in this country of ours, the mine accidents and the vigils, and Las Vegas and New York, the news, it becomes reality shows actually.

But I'm telling you, there is nobody in the United States of America that does not want workers safe and healthy. So my question to you, Mr. Foulke, is what is it going to take? What is missing in this picture? Why can't we do it right? You have the entire country behind you. What is it going to take from the Federal, the representatives, what is it going to take from the administration? Because right now what we have is not the will to cut in half at least rulemaking. So why would it take 4 years? You have your reasons and your rationale. If there is a will, we can do it quicker but you must need the support to do it. Why are we competing with enforcement, competes with prevention, competes with protection? We need all of it. We don't need competing priorities. We need to keep our workers safe and healthy. What will it take?

Mr. FOULKE. What I would say is once again we are focusing on moving the standards as quickly as we can.

Ms. WOOLSEY. We heard that. It is not very quick. Why does it take so long? And I don't want because it takes all these people and this and 120 pages. Then put 120 more people on it. What is it going to take?

Mr. FOULKE. And we have our full reg agenda and we have people on every one of our reg agendas pushing to move this forward.

With respect to the cranes and derricks, once—as in any of the standards, there are certain things that the Congress has mandated that we go through, the SBREFA panel. The SBREFA review is required under the SBREFA act. The courts have indicated, have required us to put in certain things. They require us to do feasibility and risk assessments.

Ms. WOOLSEY. Do they require it to take 4 years?

Mr. FOULKE. Well, the time period to do those things, it is not that we—

Ms. WOOLSEY. Okay, I can't—you are going to repeat what you already said, and I don't want you to have to do that.

Now I have another question. I am from California. Cal OSHA has always been stronger than fed OSHA. That is why it was my understanding that Cal OSHA stood. So now we have waivers for quite a few States. And isn't that based on the State being independent of OSHA if their regs and their programs are stronger, better in so many words? If it turns out they are not, or at least they don't—aren't equal to OSHA, how does—who and how is that waiver taken away from them? That right?

Mr. FOULKE. The standard that you are talking about is under the act, the act originally started out with a national safety and health program nationwide. But the provisions of the act allowed for States to take over safety and health programs. The standard of care or requirements for the State is that they be at least as effective as the Federal OSHA and that is what you are saying, the Cal OSHA was stronger, has changed some of their standards to be more rigorous. But that is also in structure and performance. And so we are responsible to and we audit the States. They are supposed to have a strategic plan. We are supposed to make sure that they are making good on their goals and reducing injuries and fatalities. So we do audit them.

And then as I mentioned earlier there is a—we do quarterly—we conduct special what they call CSPA.

Ms. WOOLSEY. Have we ever taken back the responsibility of the Federal Government from a State?

Mr. FOULKE. No, we have not. It was only one time when Cal OSHA was going to relinquish its plan back to Federal OSHA. They did it for a small period of time. But we have not. But we have done studies on State plans and we also have what they call CSPA complaints where a complaint can be filed by a State concerning a State plan and we investigate that complaint.

Ms. WOOLSEY. Mr. Chairman, may I ask one little question of Mr. Cole? One little question, and he will give me one little answer.

Mr. Cole, did your brother-in-law ever complain about safety conditions on the site? And was there a employee safety committee or a process for complaining?

Mr. COLE. My brother-in-law, I saw him probably 3 days prior to, maybe a week before his death, and he went to work at City Center for his overtime. He was working on another job. And after he got there, he did not talk to me about the job, so I can't tell you that. I wish I could, but I can't.

Ms. WOOLSEY. Thank you very much. We are over time. Thank you, Mr. Chairman.

Chairman MILLER. Mr. Holt.

Mr. HOLT. Thank you very much. Thank you, Mr. Chairman. Mr. Foulke, I would like to get on the record answers to several questions. First, will we see silica standards this year? Will we see confined space standards this year? And will we see lockout-tagout standards this year?

Mr. FOULKE. We are working on the silica standard. We are in the process of doing the next step in the process—doing the peer review of the data. And so we are moving forward on that.

With respect to the confined spaces, I am assuming you are talking about confined spaces in construction. The confined spaces in construction standard we issued a proposed rule. We did receive comments on the proposed rule. And we also received a request for a hearing. And I believe the hearing on the confined space construction is July 22 of this year. So we will be moving forward with that.

And the lockout-tagout, we have a lockout-tagout standard. We are working on a maritime. We are having regulatory hearings. We are going to have hearings on the maritime lockout-tagout.

Mr. HOLT. The construction lockout-tagout is in effect?

Mr. FOULKE. We are using the lockout-tagout for construction used in the general industry standard.

Mr. HOLT. So the answer to my three questions, will we see those this year?

Mr. FOULKE. You will—for silica—we are not doing a standard on lockout-tagout for construction. We are just doing one on maritime. We are having a hearing on that. And once the hearing is completed we will review that.

On the silica, the peer review, and from peer review the next step after that would be a proposed rule. I don't know if that will be completed by the end of the year, just depends on what the peer review determines.

And on the hearing on confined spaces in construction that will be—like I say, is on the 22nd of July. And once we get the review from that, then we will go forward, make whatever changes, depends if we have no comments at the—from the hearing arguably the potential to have a final rule this year, there is the potential for that. It just depends what comes out at the hearing.

Mr. HOLT. I understand it is customary at the end of an administration to start shedding responsibility. I would just urge you to, you and everyone in OSHA, to show a greater sense of urgency. I realize some of the work will not be completed in this administration. But I sure hope that you can have as much completed as possible and have everything else teed up for the next administration to implement because we are seeing too much, too many injuries, too many deaths. And despite your rosy statistics, it just doesn't match with the experience I hear from people in the workforce and certainly what we see reported.

So with that, Mr. Chairman, I say thank you for setting this up. Chairman MILLER. Thank you.

Mr. SARBANES.

Mr. SARBANES. Thank you, Mr. Chairman. And Mr. Foulke, you said there are 1.6 million employees that have been trained through the OSHA Ed program? Is that right?

Mr. FOULKE. Usually we classify it as 1.6 participants in the 10 and 30-hour courses.

Mr. SARBANES. So they are getting at the minimum 10 hours training. Do you think it ought to be mandatory that everyone who is working in the industry should—

Mr. FOULKE. We already have a mandatory requirement with respect to training. It is with respect to specifically going to 10-hour, 30-hour courses. I think we would have to look and see how—how that would impact on, there is a lot of things. To go mandatory on that we would have to go through once again how that would impact on small businesses. How—what is the—how would that—how much it would cost to this particularly the small business and how it would impact them, how it would be—we would also have to do paperwork analysis on that. So I would have to look at that before I say should we go to a 10 or 30-hour mandatory OSHA course.

Mr. SARBANES. Leaving the cost and impact and so forth aside, just looking at what a worker comes away with training, what is the argument against every worker having that safety training of at least 10 hours?

Mr. FOULKE. I think yeah, I know in my private, in my experience in private practice and dealing with clients that were in the construction industry and even in general industry. But they are doing a lot of training. We do not know exactly the scope of the training being done by the employers in-house through consultants or whatever. They may be providing all this. They may have a much more broad inspection or training program than is required under the 10-hour or even the 30-hour course because I know some of my clients did have that type of thing.

So to say they are not getting the training, I can't say that all the—that we are deficient necessarily in training.

Mr. SARBANES. But if they weren't getting the training, would that be a bad thing?

Mr. FOULKE. Well, first of all, they are responsible for providing training. There is a mandatory requirement for training in the construction. So they would be in violation of the standard. But secondly, like I say, I believe personally that, you know, keeping employees safe is a moral responsibility for employers.

Mr. SARBANES. So you think they should be getting the training, that every employee should be getting—

Mr. FOULKE. I think they have to. They are required to provide training. So that is the law. So they should be providing training.

Mr. SARBANES. My impression is that there is a certain dimension of viewing this workforce as kind of a disposable workforce, which is the thing that I think is troubling a lot of people here.

Before I run out of time, though, I just would want to ask Mr. Ayers, in your testimony you talk about this recommendation of actually creating a dedicated construction OSHA. I just wondered if you could talk a little bit more about why you see the need for that.

Mr. FOULKE. Yes, sir. We think that it is very important to address all the injuries and fatalities that we are seeing now because it is similar to the Mine Safety and Health Administration. I meant the deaths of miners, it is a terrible thing, but in comparison to the death of construction workers, it is not even close. So what they have done for the miners has proven to be effective. They have regular inspections of mines. You know, quite frankly we have roughly 800,000 construction projects, and under the current level of inspections going on, it would take 17 years to inspect all those projects. Now granted, they start and they stop and they move

around. But a separate agency for construction is badly needed as much as a mandatory 10-hour OSHA certification.

Mr. SARBANES. And before the time runs out, given that there is limited resources always, I guess, what are the kinds of things that would flag dangerous work sites where you could say, well, we better send somebody out there. I may be looking for counterintuitive things. Like we talked last week, we had a hearing on the poultry industry and, well, I guess they were talking about the steel in one instance, but where there are instances where the reported injury is zero or one for location where that is just not plausible. So you say, well, those are the places you ought to be sending some inspectors out because something is going on. Is there similar kinds of triggers or flags you can point to that would help allocate resources or not really?

Mr. AYERS. Not really. What frustrates us the most is typically the larger ones are the ones subject to inspection and typically the larger jobs are the safest jobs. Now City Center is a exception, but you are looking at a \$9 billion, largest commercial project in America. They have stacked workers, working around the clock. There are a lot of problems, why there are problems there.

But again to answer your question, I think the focus should be not so much on the large projects but focus on a good sampling of all projects.

Mr. SARBANES. Thank you.

Chairman MILLER. Ms. Sanchez.

Ms. SANCHEZ. Thank you. I want to begin my question with Brother Ayers. I am a fellow IBW member, so welcome to our panel, and I am keenly interested in some of the insight that you can lend as a witness on this panel. In your written testimony, you mentioned that OSHA's statistics undercount accidents because so many construction site workers are misclassified as independent contractors. Can you explain why this is so important that they are missing from the statistics?

Mr. AYERS. Yes. Independent contractors are an extremely big problem in the industry. And the statistics are much worse than what you have seen in my written testimony or probably the statistics you have seen from everyone here because an independent contractor is not required to report to OSHA. So if there is an injury, an illness, a fatality, it is not reported with OSHA. Therefore, BLS doesn't capture it. So the statistics you are looking at—

Ms. SANCHEZ. You think they are underreported?

Mr. AYERS. No doubt about it.

Ms. SANCHEZ. Grossly underreported?

Mr. AYERS. Absolutely.

Ms. SANCHEZ. In your opinion, do you believe union job sites are safer than nonunion sites and, if so, can you explain why that is?

Mr. AYERS. You are going to make me show my bias obviously.

Ms. SANCHEZ. Just the facts. Just the facts.

Mr. AYERS. I believe personally that the union sites are safer sites, and I only say that from the aspect that we make a point to push and offer training. Our workers have a place to go to get training. It is not to say that every nonunion worker doesn't have a place to go to get training, but more often than not they do. And

you need to keep in mind that 80 percent of all construction employers are less than 10 employees so—

Ms. SANCHEZ. So the vast majority probably don't have as easy a time accessing training?

Mr. AYERS. Right. Again, that is why we think it is very important that an emergency 10-hour standard be adopted.

Ms. SANCHEZ. Thank you.

Mr. Foulke, you described OSHA, and I am quoting here, unprecedented levels of Hispanic outreach, yet a recent government report revealed an unprecedented level of Hispanic work-related fatalities especially in construction. The report found that in 2006 the fatality rate was 25 percent higher in Hispanics compared to all other workers and foreign born Hispanic workers had a 70 percent higher rate of work-related injury deaths compared to native born Hispanic workers. From 1992 to 2006, deaths from falls among Hispanic workers increased by approximately 370 percent.

So what is it that you are doing wrong? Because you are talking about outreach, training and education, and some distribution of Spanish language materials. But you are not mentioning enforcement. And clearly there is something that is failing if you have statistics like this going up for Hispanic workers.

Do you have any ideas of how you can improve cutting the fatality rate for Hispanic construction workers?

Mr. FOULKE. Let me—first of all, I misspoke about an earlier question about the general industry. Lockout does not apply to construction. We do have a small construction lockout-tagout.

Now to get to your question on Hispanic workers, it is clearly a concern of ours about the number of fatalities in the Hispanic community, and we have been working very diligently and doing a lot of outreach. And I understand what you are saying. But we also, you have to look at our enforcement. We have focused our enforcement. We don't target and say we are looking for enforcement for Hispanics. The enforcement is across the board.

Ms. SANCHEZ. I understand, but that then leads to the belief on my part, and I don't think wholly unrational, that there isn't enough enforcement going on across the board.

Mr. FOULKE. Well, the overall fatalities numbers have reduced.

Ms. SANCHEZ. But they are going up for Hispanic workers and that is sort of the largest growing segment of the workforce, if I am not mistaken.

Mr. FOULKE. I think it is the largest expanding segment of the workforce. And we are focusing on trying to get to the Spanish speaking workers because clearly our efforts on—the outreach efforts are tied into our enforcement though, too, because we—last year, 67 percent of all Federal and State—74 percent of—excuse me, over 50 percent, 51 percent of our OSHA inspections were construction where a lot of the fatalities are occurring for Hispanic. So we are targeting that area.

One of the areas—

Ms. SANCHEZ. My recommendation, because I have got a couple other very brief questions I would like to ask you, is that you really step it up in that area because it is clearly a glaring failure in terms of statistics. You are talking about, oh, injuries are down. Deaths are down. In this particular segment of the population, it

is a very clear, very pressing, urgent problem, and I urge you to take double time in terms of trying to address that.

Mr. FOULKE. Okay.

Ms. SANCHEZ. If the chairman would indulge me, can I ask unanimous consent for 1 additional minute because I have two quick questions. Thank you, Mr. Hare. I appreciate that.

Mr. Foulke, I want to talk a little bit about the statistics you list on page 2 of your testimony because you indicate that since 2001 OSHA has issued 256 significant enforcement cases, and significant enforcement cases are those defined as those with penalties over \$100,000 in the construction industry alone.

Ms. SANCHEZ. In your testimony you write that these statistics, quote, show that OSHA enforcement is strong, end quote. So I am interested in knowing how much of the fines in those 256 cases have been collected, do you know.

Mr. FOULKE. That I do not know the exact answer on, the exact number.

Ms. SANCHEZ. I would appreciate if you could provide that later.

Mr. FOULKE. I think our collection rate is actually fairly high.

Ms. SANCHEZ. I would be interested in getting that information later. Do you know if any of the fines in those 256 were reduced for any reason?

Mr. FOULKE. Those were the—

Ms. SANCHEZ. Again these are the significant enforcement cases.

Mr. FOULKE. Since most of the cases are settled, a lot of times the penalties are reduced based on the settlement process, what is obtained as part of that settlement process. If we get additional—if we get additional things from the employer that they are going to add safety people or they are going to do more training or whatever.

Ms. SANCHEZ. So the short answer is it is likely that those fines were reduced?

Mr. FOULKE. I think you can say that, yes.

Ms. SANCHEZ. In how many construction industry fatality cases did OSHA levy a fine less than \$100,000, meaning that there was a fatality but the case was not considered a, quote-unquote, significant enforcement case?

Chairman MILLER. We are going to submit that for the record and you are going to submit the answer for the record because we have a vote on and I want to go to Mr. Hare and Ms. Berkley.

Ms. SANCHEZ. Thank you. I thank the chairman.

Chairman MILLER. Thank you.

Mr. HARE. Mr. Secretary, let me just ask you a yes or no question. Does your agency have a big enough budget and enough inspectors to ensure the safety of American construction workers?

Mr. FOULKE. Once again I think I have said in the past—today is—I think that what we are doing, the enforcement efforts, the compliance assistance, the training, the outreach, has demonstrated that we have an effective program because our injury, illness and fatality rates are going down.

Mr. HARE. Well, that is interesting because we had a hearing last week and we talked about amputations. One of those was in terms of workplace safety and accidents happening. And in the State of Michigan in 1997 there were, I think, 700 or 800 amputa-

tions and they were underreported by 64 percent. So when people are getting hurt on the job and there is underreporting to the tune of 64 percent of people who have lost a limb, which I think we would all have to agree here that is pretty significant, it is awful hard to say, I think, how much progress is being made when we are not even reporting and getting the accurate figures, number one, for people who have been hurt. The way it is now, as I understand it, if OSHA were to attempt to inspect every workplace in the United States just one time, it would take you folks 133 years to do that, which is 49 years longer than it would have taken in 1992.

Mr. FOULKE gave rather—and I missed it, but I was reading his testimony—arguments that his brother-in-law would be alive today if OSHA had enforced its steel erection standard and had not weakened it in compliance directive by removing the requirement for decking 30 feet below the workers. I don't understand how OSHA standards can provide protections. What happened here?

Mr. FOULKE. I am sorry, I don't understand your question. I apologize.

Mr. HARE. Mr. Cole in his testimony said that he believed that his brother-in-law, if I am not mistaken, would be alive today if OSHA had enforced its steel erection standard. Do you believe that is the case? Would you agree with Mr. Cole.

Mr. FOULKE. I am sorry about that incident. That particular incident occurred in Nevada OSHA, so I don't have the details of that specific incident. Under the directive that we have as to the steel erection standard if an employee, if there is not decking or netting underneath the employee within two stories or 30 feet, whichever is less, then to qualify under the directive you have to have 100 percent fall protection. In other words, they had to be tied off at all times. So I don't know the requirement on that.

Mr. HARE. Let me ask you, Mr. Cole. You discussed the steel erection standard in your testimony on page 1. And apparently the compliance record eliminated this. I am interested in your insights about this as an ironworker.

Mr. COLE. Could you repeat the question one more time?

Mr. HARE. Well, you discussed the steel erection standard in your testimony on page 1 and apparently the compliance directive eliminated the safety provisions. And so as an ironworker I am interested in your insights about this.

Mr. COLE. Subpart (r) on the final standards rule said that every other floor or 30-foot, whichever is closest, would be decked. The directive—I think it was 23, 24 and 25—eliminated that, which made it okay for a contractor to say I don't have to deck it, we can just make sure everybody is tied off. The problem with Rusty's death and a lot of deaths that happen, the law is a run-around because somewhere in erection process there has to be a working floor. A working floor is a floor that is planked solid, doesn't have a hole more than three inches and the ironworkers move from that floor to continue the building up. And it gives a place for all the other crafts to work underneath, that an accident can't happen if something goes wrong. It can't fall through that floor and hurt somebody that is underneath it. And Subpart (r) was fought for 10 years, 12 years before it became a final rule. And it has been taught by Local 433 and the international in the State of Nevada

where I am from. I taught it myself. And I was surprised and amazed that the Federal Government would come out with a directive that would take safety away as when they were the champions of putting safety in with the help of contractors and the unions to make a safe working spot for the man going to the job and his wife knows that he don't have to worry about not coming home.

Mr. HARE. So you put it in and the Feds took it out?

Mr. COLE. They took it out. It was there.

Mr. HARE. Thank you, Mr. Chairman.

Chairman MILLER. Congresswoman Berkley.

Ms. BERKLEY. Thank you, Chairman Miller, for inviting me to discuss this important issue. I want to particularly thank and acknowledge Mr. Cole for coming to share your story and your experiences. Needless to say, you have my deepest sympathy for the loss of your brother-in-law, Rusty Billingsley.

My district of Las Vegas has seen unprecedented growth in a construction boom in recent years and there are currently 40,000 new hotel rooms under construction in Las Vegas. While this construction is very important to the local economy, it is also very important more so to ensure the safety of the workers that are building our city for the future. Unfortunately, my hometown of Las Vegas has seen a high number of construction-related deaths, and we are here to make sure that everything is being done to protect our construction workers.

Make no mistake that the construction workers on-site in Las Vegas are the highest quality building trades unionists in the country. They have the expertise, the quality of their work is unsurpassed, and they have experience on the job of many years and many construction sites. They are second to none. I am hopeful that the purpose of this hearing and through this hearing we will be able to shine a spotlight on this most important issue so that those who are on the job and at risk can have the safest possible work site conditions available.

I have a couple of questions. And Mr. Cole, I want to be as sensitive as possible, but I would like to get short answers if you could possibly, just so we have this on the record for absolute sure.

Do you believe the OSHA compliance directive on steel erection standards provides equivalent protection to ironworkers during the steel erection process? Is that a yes or a no?

Mr. COLE. Subpart (r) does give protection in many ways. The directive does not.

Ms. BERKLEY. The directive does not. Thank you.

Do you believe, and I know this is a difficult question to answer, that your brother-in-law might be alive today if OSHA had enforced the current steel erection standard and not issued the compliance directive?

Mr. COLE. Ms. Berkley, I know for a fact of ironworkers that is alive on a 30-foot fall. I don't know one on a 60-foot fall.

Ms. BERKLEY. How did you feel, you and your wife feel when you found out that OSHA had completely dropped the penalties for your brother-in-law's death?

Mr. COLE. We were devastated.

Ms. BERKLEY. Mr. Foulke, I know that you visited Las Vegas a couple of weeks ago. According to Nevada OSHA, they have for-

mally denounced items contained in the Federal OSHA compliance directive, and after a thorough review Nevada OSHA officials concluded that certain OSHA compliance directives do not provide equivalent protection.

Now, when you were in Las Vegas I was informed that you have refused to rescind certain Federal OSHA compliance directives but agreed that you would consider suspending them until further notice. Have you in fact done that?

Mr. FOULKE. No, I am going to clarify that. What I said is that I would be—I received—first of all, I met with Nevada OSHA and talked to them about the current situation. Then I made it a point to meet with all of the—

Ms. BERKLEY. I know who you met with.

Mr. FOULKE.—Employers and then I met with the unions. As part of that discussion additional information regarding the steel erection standard and the issue regarding fall protection, the 100 percent fall protection issue, was brought to my attention. And I advised them that I would begin to review the situation and determine what, if anything, would be done.

Ms. BERKLEY. And have you done that and what is your conclusion?

Mr. FOULKE. We are still reviewing the information.

Ms. BERKLEY. And how long is it going to take you to review this? I don't want to turn on my television in Las Vegas and hear that another worker at one of these sites, construction sites has fallen to their death. So there is a bit of urgency here. So when do you plan to do this?

Mr. FOULKE. I understand, Congresswoman, but you need to understand the directive requires 100 percent fall protection if there is no decking or netting, so that if they fall, their lanyards should stop them from falling. There should be no falls. The directive actually provides more protection to a certain degree.

Ms. BERKLEY. According to Nevada OSHA and everybody else, that is an accurate statement. The reality is that if we had left the current steel erection standards in place and not issued the compliance directive Mr. Billingsley and others might be alive today.

Mr. FOULKE. I don't know the answer to that, but I also do not know the answer to the use of 100 percent fall protection when there is—

Ms. BERKLEY. So what are you going to do?

Mr. FOULKE. There may have been employees that are alive today because of the 100 percent fall protection. But because we prevented them from being killed or injured we don't know that.

Ms. BERKLEY. What I would like to do, I am going to submit this question to you and I would appreciate if you responded. What more can you do, what more resources are needed to help prevent additional construction tragedies in Las Vegas. I would appreciate a comprehensive answer so that we can implement these things and save people's lives.

Thank you very much.

Mr. FOULKE. Let me make one point that we have provided OSHA Federal inspectors to the Center City site that are assisting the Nevada OSHA inspectors, so we are already providing assistance at the site.

Ms. BERKLEY. Thank you.

Chairman MILLER. Thank you. Mr. Cole, I think you wanted to comment on that. I will stay here. I know you guys will run for a vote. But you wanted to comment on that question?

Mr. COLE. I just want her because she is from our State, to make her aware that the fall protection and the tie-off are two certain things. And two ironworkers in Las Vegas were tied off and they are both dead. It was over 30 feet.

Ms. BERKLEY. Thank you, Mr. Cole, for clearing that up. Thank you, Chairman Miller.

Chairman MILLER. Thank you very much.

Mr. LiMandri, you have the authority under your public health code, if I am correct, to shut a job down, is that correct?

Mr. LiMANDRI. That is correct.

Chairman MILLER. How often due to safety, health and safety has that been invoked in the city?

Mr. LiMANDRI. It has actually increased. In 2002, we did approximately 2,000 stop work orders. Just last year we have done approximately 9,900 and it is on the rise.

Chairman MILLER. 9,900?

Mr. LiMANDRI. 9,900, yes.

Chairman MILLER. I assume these are all across all the size jobs.

Mr. LiMANDRI. Yes, you can use it on any size job. It does not matter what actual work is occurring. What we want to do is we want to halt the unsafe practice, require the contractor to come in, tell us, or the engineer of record, tell us what they are going to do differently and then we allow them to go back to work.

Chairman MILLER. What triggers this, an inspection in the finding of a violation, the reporting of a violation and a confirmation of that violation by the city?

Mr. LiMANDRI. The city does an inspection based on—it could be based on an accident or it could be based on an inspection. We write a violation, the stop order work violation. It requires them to remedy the situation. That might mean remedial work prior to going back to work or a listed practice of how they are going to move forward because each construction site is different and they have particular means and methods that might have to be addressed.

Chairman MILLER. But not every violation, or let me ask you, does every violation order, I guess, or citation result in a stop work?

Mr. LiMANDRI. We issue thousands of violations a year. Not every violation requires a stop-work, that is correct.

Chairman MILLER. And how is this received in the employer community, the contractor community, how does this work?

Mr. LiMANDRI. Well, I will tell you that the best way to get someone's attention is to stop the work, getting them to identify before they go back to work a new plan. We get major compliance. We also—

Chairman MILLER. Get major complaints.

Mr. LiMANDRI. I am sorry. We get additional compliance. They go above and beyond the code. We may say that whatever the practice is today we don't agree with, we want you to do more. There

might be management changes, there might be a protocol change, we might require them to change personnel, whatever that is.

Chairman MILLER. What is New York's situation with the steel erection standard that we have been discussing here today, whether or not you have to have flooring, netting and tie-off, or if you have 100 percent tie-off essentially you don't need to do the others? What do you do in New York in high-rise construction?

Mr. LiMANDRI. Right now today I cannot comment on that at this time, but certainly we would like to go back and talk to our local officials based on what they are doing locally with our director. And I would turn that back over to Ed Foulke, if I may.

Chairman MILLER. Yeah, but wait a minute. Do you have a standard or don't have a standard?

Mr. LiMANDRI. The standard that they follow is the standard that is put out by Federal OSHA.

Chairman MILLER. Okay. So you have not done something under your health and safety codes to change that?

Mr. LiMANDRI. We don't have—

Chairman MILLER. You are living with that directive?

Mr. LiMANDRI. Yes. We basically live based on Federal OSHA. There is no standard at the State level for OSHA. We do not have a New York State OSHA plan.

Chairman MILLER. Mr. Foulke, how many States have complied with that directive? I believe that Nevada just went the other way, is that correct, in the last few weeks where they now have flooring and/or netting and tie-off?

Mr. FOULKE. That is correct.

Chairman MILLER. And California—

Mr. FOULKE. California was one that did not.

Chairman MILLER. Did not. So in California we still have the old standard, essentially flooring, netting or—

Mr. FOULKE. The standard is still in place across the country. It is not that the standard is not there. The directive finds that if you do 100 percent fall protection then it would be a de minimis site.

Chairman MILLER. You mentioned maybe in my first round of questioning that that standard was very contentious and it is making the question of whether you are going to require flooring and netting plus tie-off and that went back and forth and the standard came out with tie-off and flooring and netting, correct?

Mr. FOULKE. As I understand it, there are two exceptions that dealt with—decking was one of the exceptions, netting and decking, and then there was one for shear studs. But going back to just the netting and decking, that was, as I understand, in the proposed rule. Then there was a draft final rule that was circulated among the stakeholders which had 100 percent fall protection without the two exceptions. And then concern was raised about that, the two exceptions for decking and netting, and then the shear studs was put back in the final rule. And then—

Chairman MILLER. So the final rule said?

Mr. FOULKE. Says, still does say. It has not been changed.

Chairman MILLER. Still does say, I got you.

Mr. FOULKE. The standard still says that if you are at 15 feet up to 30 feet, you do not have to have any fall protection as long as you have either a decking or netting in place.

Chairman MILLER. Now, is it correct, it has been suggested that since the directive is put out there that fall fatalities have gone up?

Mr. FOULKE. I don't have that data, to tell you the truth. I can get back with you on it.

Chairman MILLER. Can you do that?

Mr. FOULKE. The problem is we don't know how many people have not.

Chairman MILLER. I understand that. That is true. Without the standard if people survive, they survive. That is not the test, how many people we don't know about. The test is how many people we know that have been killed.

Mr. FOULKE. You mean without the fall protection.

Chairman MILLER. Right.

Mr. FOULKE. Well, if they are using 100 percent fall protection there should be no fatality.

Chairman MILLER. Again you may use 100 percent fall protection, you may tie off on something that turns out to be faulty.

Mr. FOULKE. Which I think has happened.

Chairman MILLER. I like the idea of 100 percent fall protection, except there aren't that many things in life that are 100 percent. And tying off, it doesn't have to be your arrangement, it can be the safety line arrangement or whatever else you tie off to at that point.

I want to go back to what I talked to you about earlier in light of the New York experience. We had this series of accidents take place in Las Vegas. We had citations, I guess, if I am using the right word, citation, violations were recognized and fines were imposed. And then a second round of meetings was held between Nevada OSHA and contractors and in some cases the fines were abolished, in some cases they were substantially reduced. Since the reports in the newspaper they have held for a moment here.

Is that a practice under national OSHA where you don't have State plans?

Mr. FOULKE. On penalty reductions as a result of settlements?

Chairman MILLER. Is that how it is handled, there will be a second meeting between the employer, the contractor and OSHA?

Mr. FOULKE. Yes. Under our field inspection reference manual we have a—what they have is once the citation has been issued the employer has 15 days in which to contest the citation. During that time period there is a provision that allows for informal conference where the employer can come in and try to resolve the citation and enter into an informal settlement.

Chairman MILLER. Does that include the union if it is a union site or the worker or the worker's family?

Mr. FOULKE. Not necessarily, no.

Chairman MILLER. So how would they—what would their remedy be if the fine was abolished? What would the worker's or the union's rights be if that was done as a result of the informal?

Mr. FOULKE. Under the act once there has been a contest the unions have the ability to contest the abatement date. And that is—

Chairman MILLER. Contest the—

Mr. FOULKE. Abatement date of the violation, how long the abatement date. That is the—

Chairman MILLER. To fix the violation?

Mr. FOULKE. Correct.

Chairman MILLER. They cannot contest the fine being reduced or eliminated?

Mr. FOULKE. Not under the act.

Chairman MILLER. How does that strike you?

Mr. FOULKE. I just follow the law.

Chairman MILLER. Well, you have been a ministry in the law now for a period of time here. I mean I don't get how you can have an injured worker or a worker who has died, then you can have an informal process in which the worker or the worker's family or the union, and even the other workers on the site are not included, that that passes a smell test in this country.

Mr. FOULKE. Well, we do have a procedure to keep the—during the inspection process we do have a requirement for the surviving family members to be informed about how the inspection—

Chairman MILLER. But they have no rights in this hearing? No, I understand that.

Mr. FOULKE. No.

Chairman MILLER. But here you are making a determination in a—you know, again I don't know the evidence is hard, but in Mr. Cole's brother-in-law's case there was a substantial fine imposed, there was some question about whether or not it was faulty equipment or whether he wasn't tied off. Again I don't know that. But then in an informal hearing the fine went away and that was it. I don't understand how we can continue that process without having either the worker representative organization in the case of the union site and/or the family, somebody to be able to say wait a minute, you guys, you are making a secret handshake here without having to go to court. The company didn't have to go to court to make the fine go away. But if I want to have the fine stay in place I guess I would have to go to court later.

Mr. FOULKE. Right. Well, in my experience when I was in private practice involved in informal conferences a lot of times the unions were invited to those things, to the informal conference. But under the act they are limited as to what they are able to contest, and that is limited to the time of abatement, the date.

Chairman MILLER. And that is how the law works?

Mr. FOULKE. And OSHA does keep the families informed but they do not have—

Chairman MILLER. Mr. Kallmeyer, have you been involved in these kinds of conferences? I don't know if you have had these kinds of violations or citations with Denier Electric.

Mr. KALLMEYER. Yes, sir, I have.

Chairman MILLER. What is your sense of how this works?

Mr. KALLMEYER. I personally have been involved in one. And there was a citation issued for—it was listed as a bare copper conductor on a job site. It was an electrical violation. And the compliance officer was in error. It was a ground wire that was supposed to be bare. And we presented evidence at the hearing and the OSHA regional director brought in an electrical expert and agreed with our testimony and it was vacated basically.

Chairman MILLER. I don't know if that was a union work site, but anybody else raise questions about whether or not that should be done or not?

Mr. KALLMEYER. The OSHA represented the complaint, the OSHA compliance, or the OSHA regional director represented the complaint and provided an electrical expert to—who I believe was an OSHA employee also provided testimony as to the facts there.

Chairman MILLER. One of my concerns with this is that—I mean, we talk about fines with respect to worker safety and 24,000 citations for violations and fines levied and \$33 million. And again, as I said earlier, I don't know what that tells me. We will have that further discussion with the people at OSHA what that is really suggesting to us. And the discussion about the trend line coming down overall for accidents, and yet construction accidents is kind of uneven about that. And you have, as I said, four people a day dying on construction sites.

But when I see the same process being followed—and again this is Nevada OSHA, I am sorry they are not here at the table at the moment. But you have a repeat offender, you have Perini, Perini, Perini, Perini, and these fines keep going away. I don't get it. I mean I don't know that any of you can comment on that. But there is something wrong in that process. I recognize they are a world-wide company, they are highly respected and all the rest of that, but something is terribly wrong in this process, especially if those fines are going away after essentially a one-sided discussion. I don't say it is not on the level, but it doesn't allow for an intervener on behalf of the victim of that incident and/or the family or the representatives, the union in the case of a union work site. That just doesn't seem to make sense to me. And that is a matter of real concern.

You look at fines. And in the case of Mr. Billingsley, was it, that died in the fall, Mr. Cole's brother-in-law, it was a \$13,000 fine. We are talking about, I don't know, one part of this job was \$3.6 billion and somebody said it was \$9 billion overall. You do start to get the sense that just pay the fine and let us keep moving here, we are working 24-7. And that is a fairly disturbing aspect.

I happened to be in Las Vegas for a speech a couple of weeks ago and I was—I still have images of it 25 years ago, but I was quite stunned at the size of this project that is going on. And that is a tough project, with all due respect, to put a stop work order on with that kind of—you know, it is one thing when interest rates were low, it is another thing when that kind of construction money is very dear now in this country. And I just worry that these fines really do not provide, especially when they are waived just consistently, and these fatalities, forget the other fines, that they are sufficient to ensure a safe workplace or to change a behavior.

Mr. FOULKE. Well, Mr. Chairman, I would just say one thing to one of your points where we have companies that do come back and continue to have fines. We have our enhanced enforcement program where we have—where when we find employers that are not following or not meeting their obligations under the act, are not following the standards and we have—where we see a repeat type of situation, then we have this program which allows us to go not only to that site but also to all their sites and inspect them on that.

And also it spells out the amount, the reductions and stuff like that is eliminated from the penalty.

So we have a very forceful program to deal with those employers that don't seem to be—that have continual problems, that don't seem to get their responsibility under the act.

Chairman MILLER. Do the State plans have that same provision? Does Nevada have an enhanced enforcement? Are they required to? The question is, are they required to?

Mr. FOULKE. I don't know if they have adopted that enhanced enforcement program.

Chairman MILLER. Because their plan has to be equal to or greater than, right?

Mr. FOULKE. But that is one of our enforcement programs. It is part of like our national emphasis program, it is like our local emphasis program. They can have their own State emphasis programs.

Chairman MILLER. So whether a State has it or not, that is still a program that you carry out?

Mr. FOULKE. That we have from a Federal standpoint, correct.

Chairman MILLER. Well, I want to thank you all for your time. I think that, speaking as chair of this committee, I think that consideration has to be given to something beyond these fines. We have been around this before on fines in coal mining and elsewhere where they become, I hate to say this because it sounds so callous and it is not fair to a lot of responsible employers, but it becomes almost a cost of doing business, and that just can't be acceptable here. I think that perhaps New York City has a regime that would lead—again we have to look at the numbers here, but would lead to better enforcement. It is not a minor step. But I just don't think that certainly on some of these mega projects that the fines that we have historically watched, I am not sure that that leads to the kinds of corrective behavior, the kinds of modifications and improved safety that we would look for in the work site. And I mean this project in Nevada looks a little bit like a test case here in the sense that—the fatalities and injuries that have taken place and yet they continue and the number one tool in the arsenal, which is fines, continues to get waived. I think that raises very, very serious questions about that State enforcement and about what the Federal Government under the delegation of authority has the ability to do under the current law.

Thank you all very much for your testimony. It has been very helpful to the committee. There will be—14 days will be available for any member of the committee who wants to submit additional material for the committee. Some of my colleagues had questions that they wanted to send in writing. We will forward those to you and we would appreciate it if we could have a response to those questions.

Thank you, and with that, the committee stands adjourned.

[Additional submissions from Mr. Miller follow:]

**Prepared Statement of Christopher Lee, OSHA Deputy Regional
Administrator, Retired**

I appreciate the opportunity to submit this statement to the Committee on Education and Labor on a critically important issue to working men and women in the

construction trades in the United States—Ironworkers involved in constructing this nation's commercial buildings.

As a career OSHA safety and health professional, I devoted 28.5 years to the Agency and its mission. Since 1990, I served as the Deputy Regional Administrator in San Francisco until June 2008. Following is my personal statement as an occupational safety and health professional.

As you know, the Occupational Safety and Health Administration convened a Steel Erection Negotiated Rulemaking Advisory Committee to gather input from various stakeholders regarding key safety concerns in the steel erection industry. After considerable deliberations and many, many meetings, a consensus was reached.

After the promulgation of this standard, Subpart R—Steel Erection Standard—the Agency issued a Compliance Directive that in the minds of many concerned safety and health professionals removed safety provisions and created unsafe working conditions for Ironworkers.

The standard as written (CFR 1926.754(b)(3), and supported by a myriad of stakeholders, requires a “* * * fully planked or decked floor or nets shall be maintained within two stories or 30 feet, whichever is less, directly under any erection work being performed.” The several persuasive arguments in support of this standard include:

- Provides containment for falling objects such as tools, bolts, etc.
- Limits fall distance to Ironworkers
- Provides a platform for rescue
- Has been industry practice and OSHA standard
- The SENRAC supported this standard
- The preamble to Subpart R supports the standard
- OSHA reviewed and approved training manuals prior to publication

Of critical note is the fact that several OSHA State Programs—such as the Cal OSHA program and now the Nevada state OSHA program do not enforce the Compliance Directive, rather the requirements of the standard itself.

There are concerned parties who believe that OSHA's issuance of Compliance Directives is “underground rulemaking” whereby Federal OSHA attempts to make policy without going through a formal rulemaking process.

The entire construction industry including project owners, controlling contractors, subcontractors, and other parties rely on OSHA for consistent interpretation and enforcement of all safety standards.

It is unfortunate that many affected parties in the construction industry consider these Compliance Directives to be a source of regulatory confusion, costly jobsite delays, and unnecessary litigation.

OSHA Assistant Secretary Edwin Foulke has been quoted as saying “Even one injury or fatality on the job is one too many”.

I have attended many management meetings since Mr. Foulke assumed his responsibilities in approximately April 2006. He has repeatedly stated that OSHA has a noble mission—to ensure that the working men and women in America return home whole and healthy at the end of their working day.

Mr. Foulke, in concert with his key advisors, and the career leadership of the Regions and the Directorates, spent two years identifying a mission statement for the Agency and to identify its three core values. The core values are *respect, integrity, and commitment*.

In my opinion, Mr. Foulke, on behalf of the Agency, ought to respect the safety and health concerns of working men and women on construction worksites as noted above; should have the integrity to enforce the fall protection standard as it was promulgated and endorsed by numerous stakeholders; and, recommit to the basic ideals of the OSHA Act as it relates to construction workers in these environments.

There seems to be a disconnect between Mr. Foulke's statements and his actions. He can change this situation by executive direction—he need not convene any committees, nor submit notices to the Federal Register. He, as I understand the situation, can simply rescind or suspend the Compliance Directive. I urge, most respectfully, that at a minimum, he suspend the Directive.

Mr. Foulke has a unique opportunity to ensure that Ironworkers involved in the construction of this country's high-rise buildings, and other trade workers affected by work above, have a safer workplace from which they

can return to their homes at the end of the day—whole and healthy. That is, and has been, his stated goal from the start of his tenure.

I urge you, Mr. Chairman, and the members of the Committee, to strongly advocate to Mr. Foulke that he “do what's right” and protect these workers.

Thank you for your time and attention.

Prepared Statement of Joe Standley, President, District Council of Iron Workers, California and Vicinity

Good morning Chairman Miller and other distinguished members of the Subcommittee on Workforce Protections of the House Education and Labor Committee. I would like to submit the following statement for today's hearing and request that it be included into the official record of this proceeding. This statement was provided on June 10, 2008 in Las Vegas, Nevada that summarizes our opposition to the Occupational Safety and Health Administration (OSHA) Compliance Directive for Steel Erection that has effectively removed safety provisions to Ironworkers and has contributed to recent fatalities in Las Vegas, Nevada.

I am seeking your support today to question Mr. Foulke on OSHA's current policy to not enforce safety standards for steel erection, and his policy of supporting Compliance Directives that are contrary to safety standards contained in the Subpart R—Steel Erection Standard. It is our hope that that you will instruct Mr. Foulke to enforce the current safety standards for steel erection, and take immediate action to rescind all Compliance Directives that are contrary to OSHA standards that remove safety provisions for Ironworkers.

I am President of the District Council of Iron Workers of the State of California and Vicinity that includes California, Nevada, Arizona, and Hawaii. With me today are Doug Williams of Iron Workers local 433, Hart Keeble of Iron Workers local 416, Danny Thompson of Nevada AFL-CIO, Steve Ross of the Nevada State Building & Construction Trades Department, Jim Stanley, former Assistant Secretary of Labor for OSHA, Greg McClelland of the Labor Management Cooperative Trust, and Steve Rank of the Ironworker Management Progressive Action Cooperative Trust. Thank you for your time to be here today.

As President of the District Council of Iron Workers, the safety and health of our members is my utmost concern. In view of recent accidents involving Ironworkers in Las Vegas, and recent developments regarding the Nevada State OSHA Plan and Federal OSHA, I felt that it was necessary to establish today's press conference to clarify various issues. It is my hope that today's press conference will illustrate our long struggle with Federal OSHA to enforce safety standards for steel erection. Additionally, I want to comment on OSHA's policy of Compliance Directives that have removed vital safety provisions for Ironworkers.

First, I would like to address safety and regulatory issues pertaining to Federal OSHA that have been at the center of controversy here in Las Vegas. I regret that recent accidents and widespread confusion regarding safety standards for steel erection have been linked to a Federal OSHA Compliance Directive for steel erection. The Compliance Directive issued by Federal OSHA has effectively removed several safety provisions contained in the OSHA Subpart R—Steel Erection Standard. We have prepared copies of several documents for your review that support our claim, that the Compliance Directives that are contrary to the OSHA Subpart R—Steel Erection Standard, and expose Ironworkers to significant dangers during the steel erection process.

On several occasions, representatives from our International Association and contractor associations have met with Mr. Edwin Foulke, Assistant Secretary of Labor—OSHA, and his staff in good faith to resolve this issue. OSHA was strongly urged to rescind certain items contained in their Compliance Directive that removed safety provisions and created unsafe working conditions for Ironworkers. Despite repeated warnings to Mr. Foulke from labor and management representatives, including members of his own staff, Mr. Foulke has refused to rescind the Compliance Directive.

As President of the District Council of Iron Workers, I have a responsibility to ensure that all Ironworkers are afforded safe working conditions set forth by OSHA regulations. I also have a responsibility to ensure that safety regulations are not compromised by OSHA Compliance Directives. I have been informed that Mr. Foulke will be in Las Vegas this week, and has requested to meet with general contractors and subcontractors regarding the recent fatalities in Las Vegas. We are outraged with news that Mr. Foulke would come to Las Vegas to pontificate about fatalities and workplace safety matters, when he has refused to rescind OSHA Compliance Directives that have been at the center of controversy in Las Vegas. However, we would welcome Mr. Foulke's decision to rescind certain Federal OSHA Compliance Directives during his presentations in Las Vegas this week. Please join us in our efforts to confront Mr. Foulke regarding his refusal to enforce the OSHA standards for steel erection, and his continued policy to support Compliance Directives that remove safety provisions for Ironworkers.

Secondly, I would like to address regulatory issues pertaining to the Nevada State OSHA Plan. On behalf of the three thousand Ironworkers working in Nevada, I am

extremely pleased that Nevada OSHA has formally denounced items contained in the Federal OSHA Compliance Directive. Representatives from the District Council of Iron Workers recently met with Nevada OSHA officials, to provide documentation that supports our concern that OSHA's Compliance Directive removes safety provisions to Ironworkers. Nevada now joins other State OSHA Plan's who have refused to adopt these Compliance Directives. After thorough review, State Plan officials have concluded that certain OSHA Compliance Directives do not provide "equivalent protection" as mandated by State Plans. State Plan Officials often refer to OSHA Compliance Directives as "underground rulemaking" when Federal OSHA intends to "make policy" without going through a formal rulemaking process. This is a disservice to the stakeholders in the steel erection industry who rely on OSHA to provide consistent enforcement and interpretation of safety regulations.

The District Council of Iron Workers, controlling contractors, contractor associations, and subcontractors have supported Nevada OSHA and their decision. We commend Nevada OSHA on their decision to uphold the OSHA regulations that protect our Ironworkers and denounce OSHA Compliance Directives that remove crucial safety provisions to our members.

The working men and women that build America and those of us who represent them, look to the Occupational Safety and Health Administration to enforce the safety regulations for our protection. The entire construction industry including project owners, controlling contractors, subcontractors, and other parties rely on OSHA, for consistent interpretation and enforcement of safety standards.

Our International Association and industry stakeholders have invested a considerable amount of time and resources to raise the standard for safety performance in the steel erection industry. We were shocked and disappointed that OSHA would issue Compliance Directives that removed safety provisions for the steel erection industry that is considered a "high hazard industry". Today, these Compliance Directives continue to be a source of regulatory confusion, costly jobsite delays, and unnecessary litigation.

On behalf on 18,000 thousand Union Ironworkers in the California District Council of Iron Workers, please join us in our efforts to question Mr. Foulke on OSHA's policy to not enforce safety standards for steel erection and the misuse of OSHA Compliance Directives. It is our hope that Mr. Foulke will enforce the current safety standards for steel erection, and take the appropriate action to rescind all Compliance Directives that are contrary to the OSHA Steel Erection Standard, that remove safety provisions for Ironworkers.

Once again, thank you for your time to be here today and your attention to this matter.

[Questions for the record submitted to Mr. Foulke and their responses follow:]

[VIA FACSIMILE]
U.S. CONGRESS,
Washington, DC, June 27, 2008.

Hon. EDWIN G. FOULKE, JR., Assistant Secretary for OSHA,
Occupational Safety and Health Administration, U.S. Department of Labor, Constitution Avenue, NW, Washington, DC.

DEAR ASSISTANT SECRETARY FOULKE: Thank you for testifying at the Tuesday, June 24, 2008 Committee on Education and Labor Hearing on "Is OSHA Failing to Adequately Enforce Construction Safety Rules?"

Committee Members had additional questions for which they would like written responses from you for the hearing record.

Congresswoman Woolsey asks the following questions:

1. Mr. Foulke, I was a human resource manager for 20 years and know from experience that issues of work organization are important to health and safety. By that I mean how many hours people work, excessive overtime and what kind of stress they're under to get jobs completed quickly. We're certainly seeing this in Las Vegas and in New York.

Mr. Foulke, what is OSHA doing to address these work organization issues?

2. Mr. Foulke, it sounds like your inspectors in New York are doing great work, given how short staffed they are.

- Are they able to do anything aside from investigate accidents and respond to complaints? Anything actually preventative?

- Have you considered bringing in reinforcements from other regions?

Additionally, please answer the following questions:

1. What was the timeframe for all other OSHA negotiated rulemakings, from the time that the negotiators agreed to a proposal, to Notice of Proposed Rulemaking to final issuance of the standard?

2. Your testimony mentions 256 significant enforcement cases since 2001 in construction. Can you tell me how much of the fines in those 256 cases have been collected?

3. Your testimony states that in 2007, there were 24,000 citations for fall protection hazards, and \$33 million in penalties. Can you tell me:

a. How many inspections for fall protection hazards were conducted in construction?

b. How many separate construction sites were inspected?

c. How many of these fall protection-related inspections were a result of:

i. Fatalities

ii. Events involving injuries

iii. Complaints

iv. Referrals

v. General Schedule or targeted inspections

d. What was the median penalty of fall protection citations?

e. How many fall protection citations were there annually, from 2001-2007? What were the average and median penalties in each of those years?

4. How many construction fatalities resulted in OSHA penalties that were less than \$100,000? How many were more than \$100,000? What were the average and median penalties for fatalities in the construction sector?

5. What additional resources would be needed by Nevada OSHA to prevent additional construction tragedies in Las Vegas?

6. How many week-long crane training classes are scheduled at the OSHA Training Institute? What are the dates?

a. Are the upcoming classes filled?

b. How many attendees are

i. federal compliance officers

ii. state plan compliance officers

iii. state consultation program employees

7. About 80 percent of U.S. construction industry employers have 10 employees or fewer, and over 2 million workers in the U.S. construction industry are misclassified as self-employed or independent contractors.

What is OSHA doing to reach small employers, including home builders, and what is OSHA doing to ensure that workers are not misclassified for safety and health purposes?

Please send your written response to the Committee staff by COB on Tuesday, July 8, 2008—the date on which the hearing record will close. If you have any questions, please contact the Committee. Once again, we greatly appreciate your testimony at this hearing.

Sincerely,

GEORGE MILLER,
Chairman, Committee on Education and Labor.

OSHA's Responses to Questions for the Record

Congresswoman Woolsey Question 1: Mr. Foulke, I was a human resource manager for 20 years and know from experience that issues of work organization are important to health and safety. By that I mean how many hours people work, excessive overtime and what kind of stress they're under to get jobs completed quickly. We're certainly seeing this in Las Vegas and in New York. Mr. Foulke, what is OSHA doing to address these work organization issues?

OSHA Response: OSHA appreciates your recognition of these issues, many of which go beyond the authority of the Occupational Safety and Health (OSH) Act. For example, the Department of Labor's Wage and Hour Division administers the federal overtime provisions of the Fair Labor Standards Act. OSHA inspectors do report possible violations to them.

What OSHA will continue to do is to use all of its tools—vigorous enforcement, compliance assistance, cooperative programs and education—to ensure that employers take all necessary actions to protect employee safety and health and to impress upon them that compromising on safety and health is not an option.

OSHA uses every opportunity to encourage employers to adopt good safety and health management systems in their workplaces. Such systems, which can go beyond regulatory mandates to address the important human factors you mention,

have proven time and again to be a powerful force in reducing workplace injuries and illnesses.

OSHA has taken action to address specific problems in Las Vegas and New York City. We are assisting Nevada-OSHA with construction inspections in Las Vegas. Also, we have deployed a special Task Force in our Manhattan Area Office, which has 12 additional compliance officers and an expert on cranes drawn from other OSHA offices, to increase construction inspections in New York City.

Congresswoman Woolsey Question 2: Mr. Foulke, it sounds like your inspectors in New York are doing great work, given how short staffed they are.

a. Are they able to do anything aside from investigate accidents and respond to complaints? Anything actually preventative?

b. Have you considered bringing in reinforcements from other regions?

OSHA Response:

a. OSHA's compliance officers in New York City, as elsewhere, are actively involved not only in responding to complaints, fatalities, and accidents, but in conducting a large number of "programmed" or targeted inspections in high-hazard workplaces, which constitute about 46 percent of all inspections in New York City. These include OSHA's nationwide programs such as the Site-Specific Targeting program and the National

Emphasis Programs for silica, lead, amputations, trenching, and others. They also include 10 Local Emphasis Programs in the New York Area, 4 of which specifically address construction hazards, including falls, electrical, trenching, and struck-by/caught-between hazards.

OSHA is using every available resource and tool—enforcement, outreach, education and training—to better identify and proactively eliminate hazards, and to convince employers to do likewise. To raise awareness of occupational hazards on city job sites, OSHA has been sending copies of violation citations issued to employers on city construction sites to the employers' insurance or workers' compensation carriers, as well as to construction project owners and developers. Citations involving training violations at union-represented sites will be sent to the unions representing the employees and to their training funds.

OSHA also maintains 25 Regional and Area Office Alliances and 19 Strategic Partnerships with employers, trade associations, unions and other organizations in New York, to work cooperatively to prevent workplace accidents. The agency is planning to hold outreach meetings with unions and the construction industry to garner their feedback on construction safety issues and to elicit their support in reporting hazards and encouraging compliance with safety standards.

OSHA will continue its ongoing Alliance with the New York City Department of Buildings, under which the two agencies cross-train inspectors and managers on each agency's construction safety standards, regulations, and procedures, with a focus on the most common construction hazards likely to harm employees. OSHA's Manhattan office has been participating in a joint task force with the Department of Buildings to address scaffolds and their related fall hazards and has conducted both concurrent inspections and inspections based on referrals from the Department. Already this year, OSHA staff has conducted dozens of training sessions for construction industry groups, unions, and even NYC staff on the various construction standards, with particular emphasis on falls, scaffold, crane, electrical and struck by/caught between hazards.

b. When an OSHA region requires additional resources or assistance to address issues such as the recent crane accidents, or a natural disaster, OSHA identifies assets within the agency that are available to provide immediate internal assistance. In addition, OSHA has several safety and health experts that comprise the agency's Health Response Team and Safety Response Team, as well as several rapid response teams that respond to biological exposures, structural collapses, and radiation releases anywhere in the nation.

To address the recent crane and construction fatalities in New York City, OSHA sent 12 additional compliance officers to New York City to augment and provide support to the compliance officers already stationed in the five New York City boroughs. The agency also provided an expert on cranes from OSHA's Billings, Montana Area Office to assist the New York regional staff. The additional compliance officers are focusing their inspection activities on high-rise construction sites, cranes, and other types of places where fatalities and serious accidents have occurred over the past six months.

Committee Question 1: What was the timeframe for all other OSHA negotiated rulemakings, from the time that the negotiators agreed to a proposal, to Notice of Proposed Rulemaking to final issuance of the standard?

OSHA Response: OSHA has used negotiated rulemaking for its rulemakings for “Fire Protection in Shipyards,” for “Methylenedianline (MDA)” and for Steel Erection.

In the Fire Protection in Shipyards rulemaking, the negotiated rulemaking committee finished its work and agreed on a draft proposed rule in February, 2002. The Notice of Proposed Rulemaking (NPRM) was published on December 11, 2002 (67 FR 76213). The final rule was published on September 15, 2004 (69 FR 55667).

In the MDA rulemaking, the negotiated rulemaking committee agreed on a draft proposed rule in May, 1987 (see 57 FR 35633). OSHA issued an NPRM on May 12, 1989 (see 54 FR 20672). The final rule was issued August 10, 1992 (see 57 FR 35630).

In the Steel Erection rulemaking, the negotiated rulemaking committee completed the draft regulatory text for the proposed rule in December, 1995 (see 66 FR 5197). On August 13, 1998, OSHA issued an NPRM (see 63 FR 43452; 66 FR 5198). The final rule was issued January 18, 2001 (see 66 FR 5195).

Note that the Crane and Derricks proposed rule regulatory text, with its accompanying preamble, is considerably longer than those for the Fire Protection in Shipyards, MDA, and Steel Erection rule makings.

Committee Question 2: Your testimony mentions 256 significant enforcement cases since 2001 in construction. Can you tell me how much of the fines in those 256 cases have been collected?

OSHA Response:

SIGNIFICANT CONSTRUCTION CLOSED CASES ONLY

Fiscal year	Penalties remitted
2001	\$2,547,376
2002	\$1,159,711
2003	\$1,006,041
2004	\$1,070,049
2005	\$908,786
2006	\$611,572
2007	\$208,112
Total	\$7,511,647

SIGNIFICANT CONSTRUCTION OPEN CASES ONLY¹

Fiscal year	Penalties remitted
2001	\$15,783
2002	\$0
2003	\$84,542
2004	\$165,186
2005	\$340,433
2006	\$687,192
2007	\$331,747
Total	\$1,624,883

¹ There are a number of reasons that cases appear as “open” in OSHA’s database, even though penalties have been remitted. In some cases, employers may have contested some, but not all, of the items for which penalties were proposed in a particular case. In others, OSHA may have agreed to a payment plan, under which the employer has some period of time to pay the entire penalty. In still other cases, the employer may have paid the penalty but OSHA has not yet confirmed that the cited violations have been abated.

Committee Question 3: Your testimony states that in 2007, there were 24,000 citations for fall protection hazards, and \$33 million in penalties. Can you tell me:

- a. How many inspections for fall protection hazards were conducted in construction?
- b. How many separate construction sites were inspected?
- c. How many of these fall protection-related inspections were a result of:
 - i. Fatalities
 - ii. Events involving injuries
 - iii. Complaints
 - iv. Referrals
 - v. General Schedule or targeted inspections
- d. What was the median penalty of fall protection citations?
- e. How many fall protection citations were there annually, from 2001-2007? What were the average and median penalties in each of those years?

OSHA Response

a. There were 6,476 Federal construction inspections that resulted in fall protection violation citations.

b. 6,237

c.i 119

c.ii 43

(Employers are required to report work-related fatalities to OSHA. Employers are also required to report to OSHA multiple inpatient hospitalizations (hospitalization of three or more employees) resulting from a work-related incident.) OSHA data show 43 injury related inspections in 2007.

c.iii 459

c.iv 1,120

c.v. 4,400

3.d see 3.e below

3.e The data below reflect that penalties assessed to small businesses are generally reduced as a result of a statutorily-mandated small business penalty reduction program.

FEDERAL FALL PROTECTION DATA

Fiscal year	Citations	Median \$	Mean \$
2001	4,691	1,500	2,370
2002	5,471	1,500	2,052
2003	6,103	1,500	2,107
2004	6,056	1,500	2,072
2005	6,565	1,500	1,981
2006	6,951	1,500	1,867
2007	7,080	1,500	1,901

(Note that the median initial penalty in each year from 2001 through 2007 was \$1500. This results from the fact that the most commonly assessed initial penalty for fall citations is \$1500, combined with the fact that the lowest possible penalty (\$0) and highest possible penalty (\$70,000) are always the same. Consequently, even though the total number of fall citations was different in each of these years, the median penalty remained constant).

Committee Question 4: How many construction fatalities resulted in OSHA penalties that were less than \$100,000? How many were more than \$100,000? What were the average and median penalties for fatalities in the construction sector?

OSHA Response:

FEDERAL CONSTRUCTION FATALITY CASES

Fiscal year	No. of fatalities in cases under \$100k	No. of fatalities in cases over \$100k	Mean case penalty	Median case penalty
2001	357	11	10,849	4,000
2002	383	5	8,396	3,500
2003	355	3	8,557	4,200
2004	409	11	9,790	4,000
2005	389	12	10,521	4,500
2006	364	12	15,315	5,000
2007	372	4	9,086	4,900

Committee Question 5: What additional resources would be needed by Nevada OSHA to prevent additional construction tragedies in Las Vegas?

OSHA Response: Both Federal OSHA and Nevada OSHA, operating under the authority of its OSHA-approved State Plan, are greatly concerned about the recent construction fatalities in Las Vegas. In FY 2008, OSHA is providing \$1,112,600 in grant funds to the Nevada OSHA program. Nevada matches this funding and contributes an additional \$3,655,497 in unmatched funds. These funds support 27 safety and 11 health compliance officers.

No regulatory agency by itself can ensure that additional accidents will not occur. It is the responsibility of employers to comply with safety and health standards and to ensure that their workplaces are free of recognized hazards. In addition, Nevada requires employers with more than 10 employees to have a written job safety program to guide their compliance efforts. It is incumbent on both Nevada and Federal OSHA, through enforcement and compliance assistance, to see that employers meet their responsibilities.

In response to the fatalities which occurred at the CityCenter project, Nevada OSHA has undertaken a comprehensive inspection of that project. At the request of the state, Federal OSHA is providing an additional 4 compliance officers because the CityCenter project is unique in that it is the largest private-sector construction project in the United States. The 4 additional compliance officers are providing technical assistance to the state in completing the full-site inspection as expeditiously as possible. Federal OSHA will continue to work with Nevada OSHA and other stakeholders to enhance construction safety in Las Vegas and provide whatever further assistance may be appropriate.

Committee Question 6: How many week-long crane training classes are scheduled at the OSHA Training Institute? What are the dates?

- a. Are the upcoming classes filled?
- b. How many attendees are
 - i. Federal compliance officers
 - ii. state plan compliance officers
 - iii. state consultation program employees

OSHA Response: The OSHA Training Institute has two more sessions of its Cranes and Rigging for Construction class scheduled for the remainder of FY 2008. The dates are August 19-22 and September 9-12. The August class is filled; the September class still has seats available.

	August	Sept.	Total
Federal Compliance Officers	28	0	28
State Plan Compliance Officers	2	26	28
State Consultation Program Employees	7	8	15
Other	0	0	0
Totals	37	34	¹ 71

¹ As of August 11, 2008

Committee Question 7: About 80 percent of U.S. construction industry employers have 10 employees or fewer, and over 2 million workers in the U.S. construction industry are misclassified as self-employed or independent contractors.

What is OSHA doing to reach small employers, including homebuilders, and what is OSHA doing to ensure that workers are not misclassified for safety and health purposes.

OSHA Response: OSHA recognizes the need to reach small construction employers, including home builders, and has employed a good mix of outreach, education, enforcement and cooperative programs to deliver a multi-faceted approach to small business assistance.

OSHA offers a number of resources, programs and services to small businesses. OSHA provides web-based small business tools, including OSHA's Compliance Assistance Quick Start, which is a tool to introduce employers and employees, especially those at new or small businesses to the compliance assistance resources on OSHA's website. Quick Start currently includes several modules, including one for construction.

Other online small business tools include the OSHA Small Business Handbook and Safety Pays, which help employers estimate the costs of occupational injuries and illnesses and the impact on a company's profitability. OSHA augments the previously mentioned outreach with its Spanish-language compliance assistance resources such as safety cards, booklets, and posters, all available on OSHA's Web site.

OSHA's On-Site Consultation Service offers free and confidential advice to small and medium-sized businesses in all states across the country, with priority given to high-hazard worksites. Employers that participate in the On-Site Consultation Program may seek recognition under the Safety and Health Achievement Recognition Program (SHARP) for their exemplary safety and health programs. SHARP provides incentives and support for small businesses to develop, implement, and continuously improve safety and health programs. OSHA offers a number of other Cooperative Programs for small businesses to work with the Agency, including the Alliance Program, Strategic Partnership Program, and the Voluntary Protection Programs.

Finally, OSHA makes training available to small businesses through 26 Education Centers around the country. Through the Education Centers, several construction-related courses are available. OSHA also provides training through its Outreach Training Program.

As demonstrated by the numerous outreach initiatives already mentioned, OSHA has a multi-faceted approach for small business outreach that incorporates specific construction-related outreach.

Regarding the employee misclassification issue; OSHA compliance officers sometimes encounter individuals during a construction inspection who claim to be self-employed or an independent contractor, or encounter a company that claims that a worker is not its employee but rather an independent contractor. In accordance with the OSHA Field Inspection Reference Manual Chapter III C. 1. b. (1) Definition of employee, in such instances, it is OSHA policy to gather information to determine, based on a common law test of employee status, if the individual is in fact an employee. An entity that is not an employer is not subject to citations or other enforcement actions under the OSH Act, and individuals who are bona fide independent contractors are not employees as defined in the Act.

[The statement of Mr. Altmire follows:]

**Prepared Statement of Hon. Jason Altmire, a Representative in Congress
From the State of Pennsylvania**

Thank you, Chairman Miller, for holding this important hearing on OSHA's enforcement of construction safety rules.

Construction is one of the most dangerous industries in the U.S. In 2006, over 1,200 construction workers were killed on the job, and while construction workers only comprise 8 percent of the total workforce, 22 percent of all work-related deaths are from construction work. Despite these alarming numbers, OSHA has not updated its crane and derrick safety standards in over 30 years. Four years ago, labor and employer groups came to an agreement on new draft standards to improve crane safety that better reflects new technologies. Despite agreement from the parties involved, OSHA has yet to turn the draft into an official proposal.

I look forward to today's testimonies as well as hearing about what OSHA has done and what they plan to do in the future to address these work-related deaths. I believe that we can work together to develop adequate safety standards for our nation's construction workers.

Thank you again, Mr. Chairman, for holding this hearing. I yield back that balance of my time.

[The statement of Mr. Porter follows:]

**Prepared Statement of Hon. Jon C. Porter, a Representative in Congress
From the State of Nevada**

Thank you Chairman Miller and Ranking Member McKeon for holding this very important hearing today on construction safety rule enforcement. I also wish to take this opportunity to extend my condolences to George Cole, brother-in-law of Harold Billingsley who lost his life the City Center site in Las Vegas, Nevada. I wish him and his family all the best and extend my deepest sympathies. I also wish to express my condolences to all others who have lost their lives in similar tragedies.

Mr. Chairman, this is obviously an issue of great concern to all members of the Committee and the full House. It is of greater concern to those of us from Southern Nevada. Construction and development play a crucial role in the life and economy of my community in Southern Nevada. Construction of residences, office buildings, and resorts in Southern Nevada provide one of our most important sources of jobs and a major economic driver for my constituents. The construction of MGM Mirage's City Center resort site is one of the largest in our history and will represent the largest and most technologically advanced development on the Las Vegas Boulevard.

This project has run into some challenges since construction began 17 months ago. Along with the six deaths that have occurred to date, the recent malfunction of an unstable 180-foot crane, caused the Las Vegas strip to be shut down for an hour. A majority of the union worker's went on strike halting progress on the site.

I have taken the initiative of speaking directly with Assistant Secretary of Labor for Occupational Safety and Health, Edwin Foulke, as well as having my staff speak with Steve Ross, the Secretary Treasurer of the Southern Nevada Building Trades and Tom Czehowski the director of Nevada's OSHA. While there may be disagreement over how best to improve enforcement of standards and regulation of businesses, I believe there is consensus over the importance of safety training provided to workers and supervisors. For this reason, I have taken the action of asking the

Appropriations Committee to provide an increase in funding for our states to use for training of workers and supervisors.

I remain dedicated to finding reasonable solutions to provide for the safety of our workers. These safety concerns must be addressed by both federal and state officials, as well as the contractors and workers carrying out construction. I look forward to hearing from our witnesses today to see how our federal government can better work with state, local and union officials in providing the safest possible working environment.

Again, I thank Chairman Miller and Ranking Member McKeon for holding this hearing and look forward to a productive discussion of how our government can help protect our workers.

[Whereupon, at 12:43 p.m., the committee was adjourned.]

